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I. There is no evidence to support the commission's finding of undue prejudice and undue preference.

The order for an equalization of rates for the two types of service is in direct conflict with the evidence that the record contains, with facts that are undisputed, and with the commission's own findings of specific facts.

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(a) There is no basis in law or in fact for an equalization or rates as between the appellants and their so-called "uptown" port competitors 24

(b) There is no evidence to support the commission's finding of undue preference and undue prejudice as between the appellants and the uptown merchants 33

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II. Even if the commission's finding of undue prejudice and undue preference were valid, and even if an equalization of rates were warranted, the commission would still be without jurisdiction to raise the rates paid by the appellants in the absence of a valid finding after full hearing that such rates were unjustly and unreasonably low and a valid finding after full hearing that the new rates by which they were to be replaced would be just and reasonable 52

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IN THE

Supreme Court of the United States,

OCTOBER TERM, 1929.

ALEXANDER SPRUNT & SON, INC., *et al.*,
Appellants,

against

THE UNITED STATES OF AMERICA, *et al.*,
Appellees.

No. 19.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION.

BRIEF FOR THE APPELLANTS.

The Opinion Below.

The opinion of the court below is reported in 23 Federal Reporter, Second Series, page 874. It also appears in the record herein submitted at page 131. The reports of the Interstate Commerce Commission that have been filed in the present controversy will be found in volumes 100 and 123 of the Interstate Commerce Commission Reports, at pages 159 and 685, respectively, and also in the record at pages 41 and 56.

Jurisdiction.

The basis of this court's jurisdiction is set forth in a separate statement heretofore filed in accordance with the rules of this court.

The Facts.

The Nature of the Case:

This is an appeal from a final judgment entered by the Houston Division of the United States District Court for the Southern District of Texas. The judgment was entered in a suit brought by the appellants to restrain the enforcement of an order of the Interstate Commerce Commission. The judgment revoked a temporary injunction that the court had previously granted, denied the permanent injunction that the appellants sought to obtain, and directed the dismissal of the suit for want of equity.

The order of the commission that was under attack was entered following a report by that body upon the legality of the pre-existing differential relationship between local and export cotton rates on traffic originating at various interior points in Arkansas, Oklahoma, Texas and Louisiana and moving thence to Galveston, Houston, New Orleans and other western gulf ports, and upon the legality, also, of certain practices of the carriers under those rates. The commission found the rates and certain of the practices under them unduly preferential of the appellants and unduly prejudicial to certain of the appellants' competitors, and the order in question was entered with the object of curing the supposedly unlawful situation. That portion of the order that is in issue here directed an equalization of the two classes of rates at a prescribed level and forbade certain allowances to the appellants for substituted transportation.

The Rates in Issue and the Services Thereunder:

The local and export rates that are concerned in the present controversy cover two quite different types of service. Both services have always been offered by the carriers to all shippers in any way herein concerned, and each service has always been offered by the carriers on exactly the same terms to all such shippers.

The local rates cover transportation from the interior originating points to the ports with the right of delivery at any point within the city-delivery limits at those points. The right to delivery at "shipside"—*i. e.*, to the particular ocean vessel that is destined to carry the individual shipment—is not, however, given under local rates. The rates apply to shipments of cotton in any quantity and therefore include the obligation of unloading; in general, however, this is discharged by an allowance to the shipper. The free time allowed for unloading is 48 hours, with demurrage collectible thereafter at the rate of $2 a day for the first four days and $5 a day for each day after that. In estimating demurrage, the shipper is permitted to average his own car detentions during each month; but even then, the free detention for a single car cannot exceed 4 days. On each local movement, one free stop is allowed to shippers for the performance upon the cotton of certain necessary merchandising processes, but the privilege must be claimed at an intermediate point; it cannot be claimed at the port, *i. e.*, at the destination.

The line haul under export rates is indistinguishable from that performed by the carriers under local rates, and like the local rates, the export rates also cover the service of unloading; in all other respects, however, the service they cover is more inclusive than that given under local rates. The service under the export rates constitutes the railroads' contribution to a through service to the ultimate overseas destinations to which export cotton moves. In consequence, a through bill of lading service to such points is given as a part of the rail service, and the right to delivery at shipside is also included. This means that the railroad undertakes to deliver each particular shipment at the point designated on the wharf by the ship's agent in charge of the berth of the vessel that is destined to carry that individual shipment. The ship's agent has the cotton placed so as to facilitate loading in the order proper in view of the ports at which the vessel will call, and the railroad must deliver at the point

designated in order to secure acceptance. The storage, average, and demurrage provisions of the export service are much more liberal than those applying under local rates. The absolute free period allowed for unloading is five times as long as the period given under local rates—*i. e.*, 10 days instead of 2. This can be increased to 18 days under the average rules applicable to export shipments. The averaging permitted is that of all shipments received in any one month at any one pier without regard to the identity of the shippers. The demurrage to be paid when the absolute and average free periods are exceeded is only $1 per day instead of the penalty rates applicable upon local shipments. The rate continues the same however long the excess detention may last. The privilege of a single free stop for merchandising is given as on local movements; but the privilege is not limited to intermediate points. It may be claimed even at city-delivery points at the rail destination. The practical meaning of this is that after delivery at a city-delivery point at the port, the carrier may be called upon to return and make a second delivery to shipside. In addition to the foregoing elements of difference, the export service is expedited to facilitate making the ocean connections.

Upon shipments consigned to shipside without billing beyond that point, export rates are also collected. Such shipments move under domestic bills marked "for export". The absolute free storage period on such shipments is 4 days. It is thus shorter than the absolute free period upon shipments under the through export bills, but twice that allowed upon local movements. The averaging rules upon these shipments are the same as those upon the through export shipments, with the result that the free period on these shipments can be increased to 12 days per car. The demurrage rate, also, is the same as upon through shipments—*i. e.*, $1 per day regardless of the length of the excess detention.

For some years prior to the commission's order in the present case, the export rates charged by the carriers exceeded the corresponding local rates by 5 cents per 100

pounds; but this difference included a 2-cent wharfage fee that the carriers are obliged to pay when making shipside deliveries.* The net differential between the two classes of rates to be ascribed to the difference in the carriers' own srvices thereunder was therefore 3 cents per 100 pounds.

There are some references in the commission's reports and in the opinion of the court below to a 3½-cent differential. That was the differential between the Texas intrastate local rates to the Texas ports and the interstate export rates applicable to these ports from common points in Texas. The validity of the Texas intrastate local rates was examined by the railroad commission of that state in an investigation held conjointly with that by the Interstate Commerce Commission that is involved herein (R., 45). The orders of the Interstate Commerce Commission deal only with export rates and interstate domestic rates (R., 53 and 81). The 3-cent differential is therefore the only differential with which this appeal is concerned.

The rate schedules that established the 3-cent differential were attacked in *Louisiana Cotton*, 46 I. C. C. 451, 452 (I. & S. Docket No. 955), shortly after their publication by the carriers, but they were approved by the commission as just and reasonable and non-discriminatory. The commission reaffirmed its approval in *Galveston Commercial Association* v. *Alabama & Vicksburg Railway Company*, 77 I. C. C. 388 (Docket No. 11965), and also held that the differential must be maintained alike to all of the gulf ports to avoid unjust discrimination as between port and port on export business.

In addition to the local and export rates just described there is another rate that is involved in this controversy. This is the rate for switching movements to shipside from the cotton warehouses that are located at city-delivery points within the port cities. This charge is made up of a switching charge, in most cases $8.10 per car, and a loading and unload-

*The fee varies slightly from port to port, but 2 cents per 100 pounds is the average.

ing charge of 4 cents per bale of cotton carried (R., 322). There is some variation in the switching charge dependent upon the number of lines involved, and there is obviously a variation in the net total rate on a per-100-pound basis dependent upon the loading of the cars switched; but for cars fully laden with high-density cotton, these charges amount in most cases to about 3 cents per 100 pounds (R., 43 and 322).

The Nature of the Cotton Traffic:

After harvesting, cotton is ginned and baled by the producer, but as a rule he does nothing further to prepare it for the ultimate consumer. Instead he sells it, as it is, to some cotton merchant, usually at the nearest country railway station. The lots of cotton so sold are seldom such as the customers of the purchasing merchants would accept. The customers of such merchants are chiefly cotton mills, and they demand their cotton in large lots of even-running grade and staple; the lots sold by producers, on the other hand, are nearly always small and of miscellaneous composition. Before these can be resold they must be sorted into the standard grades and staples that the market demands. It is seldom practicable to do this at the purchasing points, for the total cotton purchasable at a single station is usually small. Instead, it is usual to assemble the cotton at so-called "concentration points", which may be either in the interior or at the ports, and there conduct the sampling, sorting and tagging that constitute what is known as "merchandising" the cotton. When these processes are complete, the cotton is ready to be sold, either to the ultimate consumer or, possibly, to some other merchant for reconcentration into larger lots or remerchandising into lots that are more exactly sorted. In any case, it is necessary that the cotton be stopped at least once by the shipper in its movement from producer to consumer.

As already intimated, the cotton traffic originates as a myriad of small shipments from scattered way stations. As

offered for transportation at these points, the cotton is nearly always "flat", or uncompressed. In this state, its density is only about 11 pounds to the cubic foot, and its bulk so great that heavy loading of railroad cars is practically impossible. The carriers early recognized that the better car-loading possible after compression made it to their interest to promote the compressing of the cotton as early as possible in its movement from producer to consumer. This was especially so for the reason that the cotton traffic is pretty well concentrated in the months when grain movements also are heaviest and the carriers' equipment therefore in maximum demand. The railroads accordingly began the practice, when not otherwise directed by shippers, of compressing at the first opportunity in transit all cotton offered to them in uncompressed bales. Rates were made for the carriage of cotton thus compressed in transit which were lower than those applying for its through carriage in uncompressed bales. Rates upon cotton presented for transportation already compressed were made lower still. These three classes of cotton rates are still continued by the railroads. For very short movements, however, upon which, of course, compression is of little advantage to the carriers, there are no compressed-in-transit rates. These exist only for movements for which the "flat" rates are 56 cents or more (R., 70).

In the beginning the compresses used under the compressed-in-transit rates were owned or controlled by the railroads themselves, but to-day compression is generally performed by shippers and others in return for allowances made therefor by the carriers. The compression performed for the carriers is so-called "standard-density" compression in which the density of the bales is increased to about 22 pounds per foot. "High-density" compression (about 33 pounds) is also practiced in preparation for ocean carriage, but in this the railroads have no interest. The rail rates do not discriminate between standard- and high-density bales.

Upon the theory apparently, that cotton moving under compressed-in-transit rates was being stopped at the com-

press points any way, the carriers early began allowing shippers to concentrate and merchandise their cotton at such points without charge. Later they ceased to insist that the privilege be claimed at the compression point, and that is the rule today. Nearly all present tariffs allow free transit concentration at whatever point the shipper may elect. Other things equal, however, the shipper is apt to do his merchandising at the carrier's compression point. There is some duplication of labor when compression and concentration are performed separately, and since the carriers of course pay the same allowance for compression whether it be conducted simultaneously with concentration or not, the merchant gains some advantage when the two processes are made to coincide. In any event, the shipper is allowed but one stop without charge upon a single movement; for additional stops, whether for re-concentration, high-density compression, or some other purpose, he is required to pay 3½ cents per 100 pounds in each case.

The practice, when the privilege of transit concentration is claimed, is for the merchant to bill and pay for shipments moving into his warehouse as if for completed movements from the points of origin to the concentration point—that is to say, he pays the local rate to that point. Likewise, when outgoing shipments leave his warehouse, he bills and pays for them as if they were independent movements from concentration point to final destination. He then files with the carrier a so-called "transit claim", upon the basis of which a refund is made to him of such part of the sums collected as will adjust his total payments to the basis of the through rates from point of origin to final destination. The in-bound and out-bound shipments thus tied together by a transit claim do not, of course, ordinarily consist of the same cotton, for the outgoing shipments are generally composed of cotton in the even-running grades and staples that have been sorted out from the many incoming shipments of miscellaneous composition. All that is required is that the incoming and

outgoing tonnages shall balance, and in striking this balance, the rule is to count all incoming shipments that have been received during a period of twelve months prior to the outgoing shipment with respect to which transit is claimed. Until this privilege is claimed, the in-bound movement is in no way distinguishable from any other completed local movement to the concentration point; and if the cotton is consumed locally or is disposed of in some other way that necessitates no further recourse to the railroad, the movement of course retains its character as a local movement to that point.

One instance of disposition of merchandised cotton without recourse to the railroads for further service is frequently seen in cases of ocean shipment by merchants that concentrate their cotton at the ports. Upon shipments moving into their warehouses for concentration, the port concentrators ordinarily pay, as do interior concentrators, the local rates to the concentration point—*i. e.*, in their case, the local rates to some one or other of the ports. Like interior concentrators, too, they pay on out-bound rail shipments as for independent movements from concentration point to final destination and then claim transit to secure readjustment to the rates applicable upon through movements. On ocean shipments, however, the favorable location of their warehouses enables them, if they prefer, to make their own deliveries to the ocean carriers without seeking from the railroads any service beyond the local movements already complete.

The railroads nevertheless have always offered a shipside delivery service to these merchants. The charge for this service, as such, is, as already stated, the established switching charge from warehouse to shipside plus a charge for loading at the warehouse and unloading at the wharf (R., 322). The service rendered in return for these charges is, of course, the same as that which is obtainable under export rates by claiming the stop for concentration at the port warehouse as a transit privilege thereunder. A port merchant is therefore entitled, upon the payment of the charges for the

delivery service to shipside, to claim a refund that will reduce his total payments to the basis of the export rates (R., 323). However, since the switching and loading and unloading charges amount to only about 3 cents per 100 pounds for fully laden cars, few such claims were actually filed under the differential in rates that formerly existed, since there was little or no gain for the shipper in so doing in most cases (R., 43). The switching to shipside was practically always treated as an independent movement.

It is apparent that the amount of the charges for the shipside delivery service definitely limits, so far as port merchants are concerned, the possible differential between export and domestic rates; for if the differential should exceed the amount of these charges on a per-100-pound basis for fully laden cars, the port merchants would simply pay local rates to their warehouses and switching and loading and unloading charges from warehouse to shipside and so evade the higher rates. The amount of the differential, and of the shipside delivery charges as well, is also limited in the same way by the cost of drayage or other substituted transportation from the port warehouses to the wharves. On the average, that cost has been about 3 cents per 100 pounds. That is the fact that determined the amount of the differential fixed by the carriers between the local and export rates. When they fixed that differential, they really wanted a 9-cent differential, but they recognized that as a practical matter 3 cents was all that they could hope to collect (R., 331, 332).

The railroads never have regarded the 3-cent differential as adequate compensation for the services they render to port merchants in making deliveries from the port warehouses to shipside. They therefore always encouraged these merchants to make such deliveries themselves. Even where export rates had been paid in the first instance upon shipments moving into port warehouses, the carriers pursued this policy. Rather than have their equipment tied up in the shipside delivery service, they preferred to pay to the port merchants allowances for substituted transportation to shipside

which on the average equalled the differential that formerly existed between the local and export rates.

The port merchants, on their part, seemed generally content, until the inception of the present controversy, to pay local rates to their warehouses and dispense with railroad service from warehouse to ships. The methods in use by these merchants for reaching shipside were, and are, quite varied—drays, barges, hand trucks, motor trucks, electric trucks, and overhead trolley systems. The cost to most of the port merchants of making their own deliveries to the ships by one or another of these methods was at least no greater than the differential in rates or the allowances that the railroads paid. In those cases in which the cost was greater by reason of the great remoteness of certain of the port warehouses from the wharves, the shippers simply insisted upon the railroads performing the additional switching service to shipside.

The proportion of interior merchants that actually paid the export rates was much greater. With their cotton already merchandised at their interior locations, the longer free storage at the ports that was possible under export rates was attractive to them, and the acceleration of turn-over possible by employing through export billing was also an advantage. Nevertheless, some of these merchants were accustomed to ship to the ports under local rates. After merchandising their cotton in the interior, they would ship it on to some port warehouse for high-density compression and leave it to the port warehouse to make the delivery to the ocean vessels. The two methods persisted side by side among interior merchants; in some cases one method was used, in some the other.

The Inception of the Present Controversy:

All parties to this controversy, it is believed, admit, and the commission itself has distinctly found, that the present litigation was precipitated by the acts of certain of the port interests in constructing, first at Houston and Galveston and

later at New Orleans, concentrating warehouses and high-density compresses upon sites within the city-delivery limits of those ports that are nearer to the wharves than are the facilities of any of their competitors at those points.

The three firms of cotton merchants, Alexander Sprunt & Son, Anderson Clayton & Company, and Weatherford Crump & Company, all of which are appellants here, were among those constructing such facilities. Title to their new facilities at Houston, is held respectively by the Ship Channel Compress Company, the Houston Compress Company, and the Turning Basin Compress Company; but Alexander Sprunt & Son and Weatherford Crump & Company own 100% of the stock in the Ship Channel and Turning Basin companies respectively, and 99% of the stock in the Houston Compress Company is held by Anderson Clayton & Company. Practically all of the cotton bought and sold by the three parent companies is handled respectively through the three subsidiaries. The subsidiaries are all joined as parties appellant here.

Despite the fact that the commission refers to the appellants' warehouses as "waterfront" warehouses, no one of them is actually on the waterfront. In all three cases, the waterfront is occupied by public wharves and docks. The warehouses stand on adjoining plots *within the city switching limits*. In the case of the Ship Channel and Houston Compress warehouses, the adjoining wharves and docks are owned and operated by those companies; in the case of the Turning Basin warehouse, by the City of Houston. The status of all these wharves and docks is exactly the same as that of any other public wharf or dock at the port of Houston; all are open to the public for the handling, not only of cotton, but of any other commodity as well; at all a general wharf and dock business is solicited and carried on. The only relation that the cotton warehouses of the appellants bear to these public facilities is that of proximate location.

It is this proximity to the wharves that gives the appellants the advantage over their port competitors of which those competitors complain. The commission refers to the warehouses of the appellants' port competitors as "uptown" and "back from the waterfront", but by reference to the terminal map of the city of Houston (Exh. A-121, here in original form, R., 2), it will be seen that these appellations are not accurate. The plant of the Clinton Compress Company (V), for example, is just as near the waterfront as the plants of the appellants, (P) and (T), and it is even further from the uptown section of the city. It is likewise further from the yards of all of the carriers. This plant is not an isolated example. *Cf.* plants at points (A), (J), (M), (H), (K), (G). All of these are either near the waterfront or not uptown or both. The significant difference between them and the plants of the appellants is that there is no wharf in proximity to them.

When cotton has been merchandised in the warehouses of the appellants and is ready for export, it has of course still to be transported to the berth of the ship that is destined to carry it, just the same as if it had been merchandised at a so-called "uptown" warehouse. At the warehouse of the Houston Compress Company, the adjacent wharf is 1550 feet long and movement from warehouse to ship's berth may be as much as 3500 feet. The movement at this warehouse is accomplished by a system of trolley lines, which carry the cotton out of the warehouse, thence to the wharf, and along it to the berth of the ship destined to receive it. The cotton must then be hand-trucked from the trolley to the point in the ship's berth indicated by the ship's clerk. At the Ship Channel and Turning Basin warehouses, hand trucks and electric trucks are used in the same way, and the distance covered may be as much as half a mile. At the so-called "waterfront" facilities in Galveston and New Orleans, the situation and the methods followed are similar. These warehouses, like those at Houston, are within the ordinary switching limits of the respective cities. At all the so-called "waterfront"

facilities there is a substantial amount of labor involved in reaching "shipside" after merchandising is complete. That it is less than in the case of the "uptown" warehouses may of course be inferred from the fact of lesser distance from the wharves; but just how much less it is, the record does not disclose, and the commission did not find (R., 50, 51).

By paying the old local rates into their warehouses and making their own deliveries to shipside, the appellants were able to obtain by virtue of their proximity to the wharves an advantage over their "uptown" competitors in the cost of getting export cotton from producer to ocean vessels. Some such advantage would have existed under the old rates whether the "uptown" merchants had also followed this practice, as they had done prior to the present controversy, or had employed the railroads under export rates for both the line haul from producer to warehouse and the extra switching from warehouse to shipside; for the appellants' costs of making their own deliveries to the ships are undoubtedly less than the 3-cent charge or differential that the railroads collected for that service. For the same reason, the appellants undoubtedly enjoyed some advantage under the old rates over those interior merchants who were accustomed to move their cotton to the ports under export rates.

Despite the fact that this advantage, whatever it was, was obviously dependent upon the single fact that the appellants' warehouses were located in proximity to the wharves, the shippers opposing the appellants before the commission contended that the advantage amounted to undue preference and undue prejudice within the meaning of section 3 (1) of the Interstate Commerce Act. That, too, was the finding of the commission that was made the basis of the order herein attacked.

The Proceedings before the Interstate Commerce Commission:

That order was entered in a general investigation (I. C. C. Docket No. 14940) that the commission had instituted on the basis of representations from the shippers herein arrayed

against the appellants. Its object was to examine into the practices of the carriers in applying local and export rates to cotton shipments moving to the gulf ports already mentioned. By order of the commission there was combined therewith the proceeding upon a complaint of undue prejudice and preference in those practices (I. C. C. Docket No. 13991) that was then pending decision by the commission. The complaint in that proceeding originally had contained as well an allegation of unreasonableness, but that charge had been withdrawn before entry of the order of consolidation (R., 44).

The order instituting the general investigation defined its object as that of ascertaining

> "* * * (1) whether the practices now alleged to be followed by certain carriers and shippers in applying domestic rates, which are lower than the corresponding export rates, on cotton delivered to waterfront warehouses and subsequently exported, are authorized by existing tariffs, or whether such practices, or any of them, constitute illegal practices; and
>
> "(2) whether any change should be made in existing tariff regulations or rates in order to avoid and remove such undue preference, if any, that results or may result in favor of said waterfront shippers or localities, and such undue prejudice, if any, that results or may result against said uptown shippers or localities, that may be found to exist."

The reasonableness of the rates being charged by the carriers was not within the scope of the investigation.

On June 23, 1925, the commission filed its report. It approved the carriers' practice of applying local rates to shipments moving into warehouses located at points within the city-delivery limits of the ports, including, of course, the warehouses of the appellants. (The commission's decision upon this point is not in issue here.) The report went on to hold the differential between the local and export rates unduly preferential of the merchants whose warehouses are located at the ports at points near or adjacent to the wharves,

and unduly prejudicial both to those whose warehouses lie at points at the ports that are remote therefrom and to those whose warehouses are located at interior points. The carriers were ordered to fix the local rates and the export rates exclusive of wharfage at the same level. The findings and the order applied to the Texas ports only; no changes were ordered in the rates to New Orleans or other ports outside that state. The commission stated that it did not intend to condemn the carriers' practice of making allowances on export movements for drayage to shipside as substituted transportation, and concluded its report with the observation that

> "The investigation did not cover the reasonableness of the rates and our findings herein are not to be construed as authorizing the carriers to increase their present revenues. Rather, the rates should be so readjusted as to preserve existing revenues."

Commissioner Hall dissented.

Following the filing of this report and the entry of the order in pursuance thereof, various petitions were filed with the commission, seeking a reopening of the investigation. Among these were petitions from the Houston Cotton Exchange and Board of Trade and the Houston Chamber of Commerce, voluntary commercial organizations of which certain of the appellants are members. The petitions also asked that the investigation be broadened to include the practices of the carriers in granting concentration privileges and compression allowances at interior points. Interests at New Orleans sought further consideration of the practices at that port, and the carriers themselves represented that they could not comply with the commission's order without violating another of its orders entered in an earlier proceeding, known as *Galveston Commercial Association* v. *Alabama & Vicksburg Railway Company*, 77 I. C. C. 388 (Docket No. 11965). The carriers therefore asked the reopening of that proceeding as well, in order that it might be determined whether the earlier order should be modified to permit of compliance with the later.

In the earlier proceeding (Docket No. 11965), certain trade associations in Galveston and Houston had complained that the rates, both export and local, on cotton moving into those cities from points in Oklahoma, Arkansas, Louisiana, Tennessee, and Mississippi, were unjust and unreasonable, and, in comparison with the corresponding rates to Mobile and New Orleans, unjustly discriminatory as well. In the report thereafter filed, the commission made detailed findings as to the character of the individual rates that were under attack and entered an order accordingly. The general effect of the report and the order was to approve or establish as just and reasonable maxima certain specific local and export rates to the gulf ports of Houston, Galveston, Texas City, and New Orleans, and to approve the rate relationships between port and port that resulted from these rates as relationships that were non-discriminatory. The local and export rates attacked before the commission in the present controversy were among those so approved or established by the commission as reasonable maxima and as rates that were non-discriminatory as between the ports.

It has been stated that the order of June 23, 1925—*i. e.*, the first order in the proceeding involved in the present controversy—applied only to ports in the state of Texas. Compliance would therefore have disrupted the rate relationships that the earlier proceedings had approved and established between those ports and New Orleans, for the report of June 23, 1925, had made no new findings in reference to these relationships. In view of this situation, the commission on December 28, 1925, ordered this earlier investigation (Docket No. 11965) also "reopened and assigned for further hearing in connection with Dockets Nos. 14940 and 13991 on the question of whether the order therein should be modified".

In its other order of the same date, the commission said that Dockets Nos. 14940 and 13991 were

> "* * * reopened for further hearing in order to determine whether conditions exist which were not developed during the previous hearings, or whether changes

> have since taken place which would justify any modification of our findings in *Rates on Cotton to Gulf Ports*, 100 I. C. C. 159, and the order entered in Dockets Nos. 14940 and 13991 on June 23, 1925; to determine what rates shall be established to comply with our findings and order; and to determine the issues set forth in the next preceding paragraph hereof."

The "next preceding paragraph" ordered that the investigation in Docket No. 14940 be broadened

> "* * * to include therein the determination of (a) what services are accorded and what charges, payments or allowances are made by said carriers in connection with the handling of cotton at interior points, including payments for compression, and whether any of such services, charges, payments or allowances result or may result in unjust discrimination, or undue prejudice or preference, or otherwise violate any provisions of the interstate commerce act, and what changes, if any, should be made in such services, charges, payments, or allowances; and (b) whether the findings in said proceedings shall be extended to any ports in Texas, Louisiana or Alabama, other than those specified above [*i. e.*, other than Galveston, Houston, Texas City, Beaumont, and Port Arthur, Texas; New Orleans, Louisiana; and Mobile, Alabama]".

On the theory that the proposal that the commission was to fix a definite level for the equalized rates must necessarily involve the question of reasonableness, counsel for the appellants sought at the rehearing to introduce testimony bearing upon that issue. The examiner refused at the time to rule on the admissibility of the testimony, but stated his opinion that reasonableness was not in issue. Counsel for the commission has since consistently taken the same position; and in its report of April 4, 1927, covering this rehearing, the commission itself definitely agreed with that view (R., 65).

In that report, which as a whole is made a part of the order thereupon entered, the commission affirmed its earlier

finding of undue prejudice and preference in the existing local and export rates to the Texas ports, and extended that finding to include the Louisiana ports as well; and despite its repeated statements as to the scope of its investigation and despite, also, its omission of any finding of unjustness and unreasonableness in either export or local rates, it undertook to remedy the supposedly unlawful situation by means of an order to the carriers to increase their local rates by 1 cent per 100 pounds and to lower their export rates (exclusive of wharfage) to the same level. The report also held that allowances to the appellants under export rates for substituted transportation from warehouse to ship's berth would be unlawful if made to cover movements from their warehouses to adjoining wharves and piers, but authorized and approved allowances in other cases of substituted transportation from port warehouses to shipside. The report also approved the granting of free concentration privileges in transit at interior points and the making of allowances at such points for the compression of cotton moving under compressed-in-transit rates. (The commission's decision in respect to concentration privileges and compression allowances at interior points is not in issue here.) Commissioner Hall again dissented from the majority position save in respect to the decision upon interior concentration privileges and compression allowances.

The Present Suit:

After the filing of the above report and the order entered in pursuance thereof, the present appellants brought suit in the United States District Court for the Southern District of Texas, Houston Division, asking both temporary and permanent injunctions against the enforcement of the commission's order.

The prayer for a temporary injunction was pressed to hearing on July 12, 1927, before a statutory court of three judges sitting at New Orleans. The temporary injunction was obtained, and by agreement of the parties, the case was

submitted to the court for final determination. Final judgment was thereafter rendered on December 5, 1927. By that judgment the temporary injunction was recalled and the permanent injunction refused. The court rested its approval of the equalization order upon its opinion (1) that the commission's finding of undue prejudice and preference was valid in law; (2) that although the commission has not the power to fix rates to remove undue prejudice or preference without a hearing upon, and a determination of, the reasonableness of the rates ~~displaced~~ so fixed, nevertheless justness and reasonableness for the purpose of removing the undue prejudice or preference, as distinct from justness and reasonableness *per se*, is all that need be investigated or determined by the commission in such a case; and (3) that an investigation and determination of such scope had occurred in the instant case. It rested its refusal of relief in the matter of allowances upon its opinion (1) that no order upon allowances had been entered, and (2) that even if an order thereon were deemed to exist, it was nevertheless a "negative order" from which there could be no relief.

Outline of the Argument.

I. There is no evidence to support the commission's findings of undue prejudice and undue preference, either as between the appellants and the so-called "uptown" sort merchants or as between the appellants and the interior merchants. The order for an equalization of rates, both as between the appellants and the "uptown" merchants and as between the appellants and the interior merchants, is in direct conflict with the evidence that the record contains, with facts that are undisputed, and with the commission's own findings of specific facts. The commission's finding is without basis under the transportation standard, and the order for equal rates is without any warrant. The order exceeds the commission's statutory power and should have been enjoined.

II. Even if the commission's findings of undue prejudice and undue preference were valid, and even if an equalization of rates were warranted, the commission would still be without jurisdiction to prescribe the level at which equalization should take place in the absence of a valid finding after a full hearing that one or both of the rates pre-existing were unjust and unreasonable and a valid finding after a full hearing as to the justness and reasonableness of the rates prescribed.

III. The commission's prohibition of allowances to the appellants for substituted transportation from their warehouses to adjacent wharves is arbitrary and in violation of law in view of the commissioner's concomitant approval and authorization of allowance for similar substituted transportation in all other circumstances. The necessary result of the commission's order is to subject the appellants to undue prejudice and to accord to their so-called "uptown" port competitors an undue preference within the meaning of the law. The enforcement of this portion of the commission's order should also have been enjoined.

IV. The sole aim of the commission in the present case was to equalize commercial conditions within the export cotton trade. The sole effect of its order in all its aspects was to deprive the appellants of the economic advantage of their superior location. The commission's order was in excess of the power that a governmental body can constitutionally exercise.

CONCLUSION: The court below erred both in its refusal to enjoin the commission's order for an equalization of rates and in its refusal to enjoin its order prohibiting allowances to the appellants for substituted transportation from their warehouses to adjoining piers. The decision below should therefore be reversed, and the case remanded to the court below with instructions to grant the relief for which the appellants prayed.

I.

There is no evidence to support the commission's finding of undue prejudice and undue preference.

The order for an equalization of rates for the two types of service is in direct conflict with the evidence that the record contains, with facts that are undisputed, and with the commission's own findings of specific facts.

The order exceeds the commission's statutory power and should have been enjoined.

Most of the facts in the present case are undisputed. There is, and can be, no denial that everything obtainable under local rates is also obtainable under export rates, and there is no denial that the export service includes, in addition, certain elements not given in the corresponding local service. It is not denied that shipside delivery, through billing to overseas points, and the privilege of port concentration on rail movements that terminate at the ports are available only under export rates. It is not denied that under export rates shippers have the free use of the carriers' cars for storage at the ports for anywhere from twice to nine times as long as under local rates; or that indefinite further use of the cars is possible under export rates at the nominal cost of $1 a day, whereas shippers under local rates pay $2 for the first four days of an excess detention and $5 a day for each day after that. And it is not denied that under export rates the whole service is expedited to facilitate connections with the ocean vessels.

There is likewise no dispute that the appellants enjoyed an advantage under the rates that the commission's order displaced; there is none that they secured that advantage by building their warehouses on sites within the city-delivery limits of the ports that were as near as possible to the

wharves and therefore as convenient as possible for direct dealing with the ocean carriers; and there is no longer any dispute that the appellants and all other merchants with warehouses within the city-delivery limits of the ports are entitled to bring cotton from the originating points to those warehouses under local rates. That, the commission decided in its first report, and the correctness of that decision is not disputed here.

The disputed points that will be considered in the first division of this brief are as follows:

1. Whether the railroads may legally collect *anything more* than the local rates when, after the completion of such a local movement to a port warehouse, they are asked by the shipper to return and get the cotton and reswitch it to the berth of the vessel that is destined to carry it overseas.

2. Whether, if *something more* than the local rates may legally be collected in such cases, 3 cents per 100 pounds is too much.

3. Whether the railroads may legally collect *anything more* than the local rates from merchants who stop their export cotton for concentration at interior points and, in sending it on to the ports, ask, in addition to the services given under local rates, the services of ship-side delivery, through overseas billing, long free storage at the ports and a general expediting of the portward movement to facilitate connections with the ocean carriers.

4. Whether, if *something more* than the local rates may legally be collected from such shippers, 3 cents per 100 pounds is too much.

Upon the answers to the above four questions depend the legality of the commission's finding of undue prejudice and preference and the legality, also, of its order for an equalization of rates. In the state of the record and the commission's findings, these questions are questions of law and not of fact. They will be considered in the order stated.

(a) *There is no basis in law or in fact for an equalization of rates as between the appellants and their so-called "uptown" port competitors.*

In getting their cotton from the producer into the hands of the ocean carriers, the only services that the appellants ordinarily ask or receive from the railroads are the following:

(1) a line haul from the producer to the port;

(2) a delivery at a city-delivery point at the port—*i. e.*, at one of the so-called "waterfront" warehouses;

(3) the service of unloading or an allowance therefor; and

(4) the storage and averaging privileges allowed upon local movements.

The "uptown" merchants that employ the export service also ask and receive these same services, and they ask, in addition, that the railroads return and make another delivery to shipside. That additional delivery means that the carriers must sustain the following items of extra cost:

(1) car detention at the warehouse during loading for the shipside movement;

(2) switching out from the warehouse;

(3) switching in at the berth of the ship that will carry the shipment;

(4) car detention during unloading; and

(5) incidental accounting and checking services.

Or it may be said, if preferred, that the extra service is a transit stop at a city-delivery point; but the extra costs remain a switching-in, a switching-out, car detention during unloading and loading, and incidental accounting and checking.

These are the services inevitably involved on every transit stop. The commission recognized this. It said (R., 71):

> "The services rendered by the carriers in the concentration of cotton are generally the same as on other traffic accorded transit."

And upon the basis of the existence of these costs, the commission determined that preservation of the net revenue of the railroads required equalization of rates at a point 1 cent per 100 pounds above the level of the pre-existing domestic rates (R., 65-66).

The existence of extra costs for the carriers as the result of the "uptown" shippers' asking the privilege of port concentration must therefore be taken to be established, and the value of that privilege to the "uptown" merchants has not been denied. Yet despite these facts, the commission prescribed for the "uptown" merchants rates no higher than the appellants pay.

Its reasons for that action are nowhere very explicitly stated. The nearest to an explicit reason is the observation in the first report (R., 48) that

> "* * * usually the same rate applies to all industries on the same road within the switching limits of a municipality * * *",

and the statement, also in that report (R., 49), that

> "* * * the rates should be so adjusted that one rate will apply for all deliveries within the usual switching limits of the ports, except that the export rates should be made higher than the domestic rates by an amount equal to the wharfage charge * * *".

It is to be inferred that the above statements were intended as a justification of equal rates only as between the appellants and the "uptown" merchants, since only the latter are within the switching limits of the same municipality as the appellants.

But the statements seem irrelevant; for "the same rate applies to all industries on the same road within the switching limits of a municipality" only when the services that such industries ask are the same, exclusive of the one element

as to which all sites within a switching area are by its establishment artifically equalized. That one element is the element of accessibility to and from the rail carriers establishing the area, on shipments incoming and outgoing over their lines. In this respect, all of the port shippers were already on an equal footing under the rate relationship that the commission condemned. One rate already did "apply for all deliveries within the usual switching limits of the ports". All port merchants were able to bring cotton to the port from any single point and secure delivery at any port warehouse or any other point within the city switching limits at the same rate—*i.e.*, the local rate to the port from the originating point concerned. All such shippers were likewise able to make shipments to any chosen destination from any port warehouse within the city switching limits at exactly the same rate; and this was true even of movements from the port warehouses to shipside, for there was but one differential for all shippers between local and export rates. The one thing they could not do was to get, without cost, this extra movement to shipside. Port concentration on export movements had to be paid for when claimed, and it is submitted that there is nothing in the fact of their location within the same cities as the appellants that can justify their receiving that privilege free. There is therefore nothing in that fact to justify the order for equal rates.

That is the only ground of the commission's action that is at all explicit; but its insistence at several points (R., 48, 65-66) on the fact that a concentration stop at interior points was available to the appellants and other shippers using local rates rather indicates that it thought the costs of the port privilege under export rates not really additional in character, and so, no justification for a difference in rates. It seemed to assume that the port privilege was always claimed in place of the similar privilege at interior points that was available to shippers using local rates.

That notion is not accurate. It is of course quite true that cotton moving into the appellants' warehouses under local

rates can be stopped without extra cost at interior points, and it is quite true that the privilege of such stops is sometimes claimed upon such cotton. Some of the cotton the appellants export is purchased from interior merchants who have already merchandised it at interior points. Upon such cotton the seller's merchandising stop at the interior point is ordinarily claimed as a transit privilege upon the through movement from producer to port under domestic rates. But this same practice is followed by "uptown" merchants on export cotton similarly purchased, and under the rate adjustment that formerly existed, it was possible, in addition, for the "uptown" merchants to have such cotton switched to shipside upon payment only of the switching, loading and unloading charges already mentioned. Since these were in most cases no more for fully laden cars than the differential between export and domestic rates, the "uptown" merchants were enabled in effect to get from the railroads both an interior and a port stop for the money equivalent of the export rates.

Nevertheless, since a few of the "uptown" merchants, very far from the wharves, could not accomplish this, it will be assumed for the sake of this argument that the costs of the port privilege under export rates were never additional to the costs under the corresponding local rates and that the port privilege, when claimed under export rates, always replaced the interior privilege available under the local rates to the ports. But even so, there is no basis in fact or in law for the commission's order.

The appellants in the proceeding before the commission urged that free transit concentration should be abolished at all points other than those at which the carriers themselves stop the cotton for compression. They recognized, as did also the commission in its second report, that

> "The services of the carrier in handling cotton for compression are substantially the same as for concentration in so far as the movement into and out of the concentration or compress points is concerned, but, when

> the cotton is compressed the compress companies are required to load and unload the cars" (R., 71),

and that

> "When concentration takes place at a compression point, there are scarcely any transportation services rendered by the carriers in addition to those rendered in connection with stopping cotton for compression" (R., 75).

They recognized that these facts might justify free concentration at the railroads' compress points, but they could not see what there was to justify free concentration privileges elsewhere. For it is obvious that stops at points other than railroad compression points are for the shipper alone, and the substantial costs that such stops involve are absolutely additional to the costs that the carriers would sustain if they were not claimed.

The commission, however, pointed out that interior concentration is an affirmative benefit to the carriers even when claimed elsewhere than at their compression points. It said (R., 75-76):

> "Interior concentration is an important factor in regulating an even flow of traffic and may be likened somewhat to a series of reservoirs in supplying an even flow of water for irrigation purposes. Without interior concentration, the cotton crop would have to be shipped during the gathering season which is also the grain-moving season, and the resultant car shortage in the interior and congestion at the ports, particularly at the mixed-shipment platforms, might seriously disrupt transportation and general business activities throughout the entire cotton-producing section.
>
> In the assembling of cotton at the interior compresses where concentration is authorized, the carriers can and do use many cars otherwise unfit for service. Ordinarily, the length of haul from the originating point to the compress and concentration points is relatively short, and during the peak of the movement the carriers use cattle cars, bad-order box cars with leaky roofs, flat cars and

> sometimes open equipment which could not be used for hauls to the ports or distant destinations."

Earier in the report (R., 70), the commission had also said that

> "Concentration [meaning interior concentration] has been also of substantial advantage to the carrier as it increases the car loading beyond the transit point * * *".

On the basis of these findings, the giving of first concentration without cost at interior points was held to be justified. The appellants accept that decision as sound in fact and law.

Now it should be noted that the real effect of the old local and export rates was to charge for first concentration in transit when the privilege was claimed *at the ports on export movements,* but to allow first concentration in transit without charge in other circumstances. Thus, first concentration in transit was given without charge *at interior points* both to port and interior merchants *upon domestic movements that terminated at the port,* and it was also given without charge *at the ports* to both types of merchant *upon domestic movements that extended beyond the ports.* It will presently be shown that the higher export rates that formerly existed were amply justified in the case of interior merchants by the cost and value of the expedited service to shipside, the through billing to overseas points, and the greater liberality of the storage and average provisions of the export service. It follows that first concentration in transit must be deemed to have been given without charge *upon export movements* to interior merchants *at interior points,* and it has been shown that it was given without charge *at interior points* to "uptown" port merchants upon export cotton *under what was the pecuniary equivalent of the export rates.* The "uptown" merchants have, generally speaking, little use for the through overseas service afforded by the carriers under export rates; their interest is mainly in the port concentration privilege and the subsequent switching movement to shipside. Those

are the items of the extra service under export rates that they customarily claim. The carriers must therefore be deemed to have collected the 3-cent differential from them mainly as compensation for the services rendered in connection with the port privilege and shipside delivery. That, at least, is the best face that can be put upon the "uptown" shippers' complaint against the railroads. If that is the true situation, as it seems to be, it constitutes the only instance under the old rates in which the carriers charged for first concentration.

The commission apparently sensed that this was true, and although it did not say so in so many words, it apparently felt that the carriers should not be permitted to sell to one shipper what they gave without charge to another. But that without more is not the law as it has been expounded by this court.

In *Interstate Commerce Commission* v. *Diffenbaugh*, 222 U. S. 42, the carriers were accustomed to pay allowances of ¾ of a cent per 100 pounds to grain elevators for elevating grain at connecting points on through traffic in connection with its transfer at such points from their own to the cars of connecting lines. Some of the elevators so employed belonged to merchants who were shippers of the grain so elevated. These merchants were accustomed to take the opportunity that elevation afforded to clip and otherwise merchandise grain of their own that passed through their hands. Complaint was made by competing grain merchants who were without elevators at the connecting points that the payment of allowances under these circumstances amounted to unlawful preference, since the shippers receiving them were using the opportunity resulting as a transit stop for their own benefit. By reason of these allowances, the merchants receiving them were getting the opportunity of performing their merchandising operations for at least ¾ of a cent per 100 pounds less than their less favorably located competitors. Whether those competitors had also to pay an extra charge for their transit stops does not appear from the

opinion. It was held by this court that the allowances could be paid without undue preference.

The case establishes that the same transit privilege may be received by different shippers on different terms if in one case there is a benefit accruing to the carrier and in the other there is not; but if the benefit accrues to the carrier in both cases, the terms upon which the privilege is given must be the same. That is established by the later case, *Union Pacific Railroad Company* v. *Updike Grain Company*, 222 U. S. 215.

In that case, the same practices were involved as in the *Diffenbaugh* case; but the carrier therein had refused to pay allowances to the complaining shipper, and suit had been brought for their recovery. The carrier pleaded that the cars emptied by elevation had not been returned to it within forty-eight hours as its allowance tariffs required. It was shown, however, that this failure was due to the rules and practices of a voluntary railroad association of which the carrier in question was a member; it was not due to delay by the shipper. It was held by this court that the allowances would have to be paid. The case was put distinctly upon the ground that the railroad had received the same benefits—elevation of grain and release of equipment—as in cases in which allowances were customarily paid. That, it is submitted, is always the condition precedent to a valid order for equal treatment. Identity of service is not enough if a benefit to the carrier accrues in the one case but not in the other.

The appellants submit that it follows that the only basis upon which the commission could lawfully have made an order in the present case for equal rates as between the appellants and the "uptown" merchants would have been a finding that the carriers receive the same benefits from first concentration at the ports upon export movements that they receive from first concentrations in other circumstances.

There was no such finding. The finding as to the benefits to the carriers resulting from transit concentration was distinctly limited to concentration at interior points, and as a matter of fact, those benefits can not accrue to the carriers

from concentration at the ports unless that concentration is succeeded by a further rail movement of substantial length. But that necessary condition excludes all instances of port concentration in which the privilege is claimed under export rates, for upon export shipments the only rail movement subsequent to concentration is a switching movement to shipside. That movement is too short for better loading of cars to be of importance to the carriers; the case as respects concentration is the same on short-haul traffic as it is as respects compression. And since the rail movement from producer to shipside is practically completed before concentration occurs, it is plain that no lessening of the peak load of the cotton traffic or of congestion at the ports can possibly result. Practically speaking, transit concentration under export rates, when claimed at a port, is not transit concentration at all, but concentration at the destination.

From that fact it results also that port concentration under export rates is invariably a source of extra expense to the carriers, for such concentration never coincides with the compression in transit that the carriers themselves effect. It is true that some transit compression is performed for the railroads at the port warehouses; but if the port be near enough to the point of origin to be designated as the carriers' compression point, hauls like the export movements that permanently terminate at the port will obviously be too short to warrant absorption of compression costs by the railroads. These costs, it will be recalled, are not absorbed by the carriers where the "flat" rate is less than 56 cents (R., 70). On the other hand, if the hauls to the port be long enough to warrant compression by the carriers, the port will never be designated by them as their compression point. The cotton will be stopped for compression long before the port is reached.

First concentration at the ports under export rates is thus unique: it always involves substantial extra costs for the carrier, and from it no benefit to the carrier can ever accrue. It is therefore no wonder that the commission laid no basis

in fact for its order for equal rates. Without that factual basis there was no warrant for that order as a matter of law; for the carriers were plainly entitled, if they chose to do so, to collect *something more* than the local rates as compensation for the port stop on export movements.

(b) *There is no evidence to support the commission's finding of undue preference and undue prejudice as between the appellants and the uptown merchants.*

It has been mentioned that the carriers collect a fee of 3½ cents under all cotton tariffs for every stop by the shipper beyond the single stop for which, under those tariffs, provision is made. It has been shown that the costs incurred by the carriers on the port concentration stops claimed by "uptown" merchants on export movements are those characteristic of transit stops in general. It has been shown that that fact was recognized by the commission (R., 71). It follows that the costs of the port stops are exactly the costs of the shippers' second stops for which the 3½-cent fee is charged. The two stops are also alike in that neither ever benefits the carriers and neither ever coincides with the carriers' own stops for compression. The fee for shippers' second stops is approved by the commission in this very case (R., 48-49). If that fee is justified, and it undoubtedly is, it follows *a fortiori* that 3 cents is not too much for an indistinguishable service for the "uptown" merchants.

That is the amount that the carriers charged through the differential in rates for the port concentration stops on export movements. There is in the record no evidence whatsoever of any transportational distinction between these export port concentration stops and shippers' second stops on cotton movements generally. In the absence of such evidence, a finding of undue prejudice and preference based upon the carriers' practice of making a 3-cent charge for the port concentration stops on export movements coupled with an approval of the 3½-cent fee for the second stops generally, is capricious and arbitrary and without any basis in fact or law.

(c) *There is no basis in fact or in law for the commission's order for an equalization of rates as between the appellants and the interior merchants.*

It has been pointed out that in getting their cotton from the producer into the hands of the ocean carriers, the only services that the appellants ordinarily ask or receive from the railroads are the following:

(1) a line haul from the producer to the port;

(2) a delivery at a city-delivery point at the port—*i. e.*, at one of the so-called "waterfront" warehouses;

(3) the service of unloading or an allowance therefor; and

(4) the storage and averaging privileges allowed upon local movements.

Interior merchants employing the export service to get their cotton to the ships receive identically the same line haul and the same unloading service; but in place of the local storage and averaging privileges, they receive the more generous similar privileges of the export service, and in place of delivery at a city-delivery point, they receive delivery at shipside. In addition, they receive the through billing service to overseas points, the expediting of the portward movement to facilitate ocean connections, and the privilege of transit concentration at interior points. The last, of course, is not important, since the appellants accept as correct the commission's decision that the transportational benefits of interior concentration are sufficient to justify the carriers in allowing it to shippers without any charge. There nevertheless remains a differential in service consisting of the following four elements:

(1) port delivery at shipside in place of a city-delivery point;

(2) the greater liberality of the storage and averaging privileges of the export service;

(3) the through export billing service; and

(4) the expediting of the portward movement.

The value that shipside delivery and long port storage have for interior shippers is obvious. It is, of course, the result of the natural disadvantage of their interior location for engaging in the export trade. If the railroads did not offer the service of shipside delivery to these merchants, they would have to provide for the making of their own deliveries to the ocean carriers through forwarding agencies or port branches; and if generous storage and averaging privileges were not given these merchants under the railroad's export service, they would have to purchase or hire storage space at the ports to hold their shipments pending arrivals and departures of the ocean vessels. The need of the interior shippers for more generous free time and averaging privileges was described before the commission by J. L. West, a witness representing them. He said (R., 330):

> "In my experience as a railroad man, we were confronted for a good many years with the representations of shippers and steamship lines that they were not given a fair amount of free time on through shipments, and I think they were right. It is necessary from the standpoint of the actual physical handling of traffic that there be longer free time on traffic going through from railroad to ship than on traffic for destination at a local place in the port. That is true because of the uncertainty of the arrival and departure of ships and of the arrival and delivery of the cotton by the rail carrier with regard to the water carrier's schedule. The interchange of traffic between water and rail carriers involves contingencies that ought to be taken care of by a larger allowance in free time. The only reason for the difference is that the connection between rail and water carriers is uncertain and a little more leeway is necessary."

Another witness, Benjamin Clayton, cotton merchant, described as follows the advantages to interior shippers of the railroad's export service (R., 299):

> "By the use of the export rates, the merchant in the interior is enabled to put his cotton aboard cars, ship it through to the steamer direct, obtain his port bill-of-lading, without the necessity of taking possession of his cotton in any way; and without the responsibility and expense of finding the necessary resting place, transfer place, switching, and without any liability for demurrage."

Not a single witness denied the peculiar value that the export service has for interior merchants.

The through overseas billing service that the carriers offer under export rates adds another element of very great value for this class of shippers. In the language of the commission itself in another case (*In the Matter of Bills of Lading*, 52 I. C. C. 671, 731),

> "The advantages of the through export bill to the shipper are important. Being a bill for through transportation, more favorable demurrage rules apply at the port than apply on domestic traffic. Moreover, if export traffic were moved to the port under a domestic bill of lading, the shipper would be obliged to take out a ship's bill of lading. This would often be a great disadvantage in financing his operations, for he could not draw a draft against his foreign customer until he had gotten this ship's bill of lading, whereas the through export bill may be negotiated immediately as is the common custom."

J. L. West, who represented the interior shippers before the commission, said frankly (R., 192):

> "The through bill is the desirable document, it saves us money."

There is nothing in either of the reports in the present case to indicate that the commission had changed its mind. The single reference to the question of value in the two reports is that contained in the following passage in which the commission no more than notes the appellants' contentions:

"The waterfront facilities and the carriers contend that the transportation costs connected with the carriage of shipments to the ports under through export bills of lading are greater than those connected with domestic shipments to the ports, and that the value of the service to the shipper is greater" (R., 46-47).

There was elsewhere no finding on value and no consideration of it. Yet the commission itself has always said that value to shippers is "the most important factor in fixing rates". *Imperial Coal Company* v. *Pittsburgh & Lake Erie Railroad Company*, 2 I. C. C. 618, 636; *Coke Producers Association of Connellsville* v. *Baltimore & Ohio Railroad Company*, 27 I. C. C. 125, 132; *Mason Valley Mines Company* v. *Western Pacific Railroad Company*, 100 I. C. C. 180, 195.

Much the same situation exists with respect to costs. J. D. Martin, chief clerk in the division freight office of the Santa Fe Railway at Fort Worth, an interior point, described in detail the costs of the through export billing service. He said (R., 186 to 187):

"* * *. On a bill of lading on 100 bales of cotton from Fort Worth to Liverpool, England, we wire the general freight office, giving particulars as to the ocean contract and rates, and ask that that be confirmed. That is a contract previously made by the shipper with a steamship agent at the port. That requires a 50-word message. We must then receive a telegram from the general freight office, telling us that the contract has been confirmed by the steamship agent, and then we have authority to sign the bill of lading. We then call the compress companies and secure the lading of this cotton, getting the car numbers and condition of the cotton. We must make out and sign 10 or 12 copies of the bill of lading, and then affix a form of validation and the office stamp. We then call the shipper by telephone and tell him that the bill of lading is complete and he sends for it or we send it to him by the porter and keep two copies for our office records * * *.

From the two office copies of the bill of lading, we are required to make eight more. Two copies for the steamship agent, one copy for the general freight office,

and one copy for the export agent. We thus make an average of 20 copies.

As a rule the charges from point of origin to destination are prepaid on cotton moving under an export bill of lading. Usually we collect at the interior points of origin, not only our own freight charges to the port but also the ocean freight charges. That makes our office responsible for a great deal of money. In some cases these confirmations designate the policy in which the cotton must be shipped from the interior. We have bills of lading calling for shipment on a specified steamer. The confirmations are usually one or three classes, prompt shipment, meaning within 10 days, immediate shipment, meaning within one or two days or so, or stating a date on which the shipment must be at the port. The railroad must see that the cotton moves. We do not have that duty in connection with domestic shipments to the port.

The export bill of lading does not show the date on which it is to sail. The contract between the owner of the cotton and the steamship agent or the owner of the steamship sometimes specifies the identical steamer, but ordinarily it calls for 'early November steamer shipment' or similarly. If they can't load it in one, they load it in the next one that may go 15 or 20 days later."

Other witnesses testifying in reference to the same matter were Warrenberger (R., 188-189), Booth (R., 182-185), Kennedy (R., 169-170), Witherow (R., 167-169), and J. L. West (R., 193). The last named witness, who represented the interior merchants, admitted without hesitation (R., 193) that

> "* * * the through bill is issued by the railroad by greater effort than the domestic bills of lading."

The testimony as a whole is in accord that connections between rail and ocean carriers involve many peculiar contingencies that inevitably entail extra labor for the rail carriers that make them.

In relation to the costs resulting from the greater liberality of the storage and averaging privileges of the export service, it was testified without contradiction that during the

heavy movement of cotton in the late fall and early winter, the cotton shipments fill up the railroad yards at the ports with resultant blockades and congestion and continual long delays in the unloading of cars. Booth (R., 243); Kennedy (R., 169). A notion of the degree of this congestion can be gathered from Exhibit A-186 (Ex. Bk. 224), which shows the monthly averages of car detentions upon shipments moving into the port of Galveston under export rates during the year from August 1, 1924 to July 31, 1925. At the peak of congestion in January, the average for the month for shipments moving under the through export bills is shown to have been 5.27 days for each of 969 cars. The table also shows that during the three months of November, December and January, when the cotton movement ordinarily is heaviest, 3,241 cars of cotton moved into the port under through bills and were detained there a total of 13,835 days, or an average of 4.27 days per car for the whole period. The table also shows that the average detention was nearly as great upon shipments moving in under local bills marked "for export". Such shipments, of course, are also export shipments; they take the export rates.

If the above averages seem small in comparison with the maximum possible detentions of 18 days and 12 days respectively for the two types of export shipment, they should be compared with the car detention averages shown in *Export Freight Free Time,* 47 I. C. C. 162, 171, for the port of New York during the "extreme and unprecedented congestion" (*ibid.* 166) of the war-time years of 1916-1917. Even for that period the average detention at New York was only 8½ days. It must be remembered that an average detention, seemingly low, may conceal many exceedingly long individual detentions. This the analyses of car detention averages at page 171 of the report in *Export Freight Free Time* will clearly show.

For all such detentions within the limits of 18 and 12 days respectively for the two types of export shipment, the only compensation that the carriers receive is that which is con-

tained in the transportation rates themselves. For such detentions there is no demurrage; practically speaking, the railroads insure interior shippers under export rates against the payment at the ports of any substantial storage costs at all. In times of extraordinary congestion, the resulting burden for the carriers may be very great (*cf., Export Freight Free Time, supra*), and the brunt of the burden always will fall upon them when they need their equipment most. This is true not only in times of extraordinary congestion as in the case last cited; it is true annually when the cotton movement is at its peak, for that peak, it will be recalled, comes at the season when movements of grain and other crops are also at their highest point.

The position of the commission on the question of the extra costs resulting for the carriers from the through billing, the longer free time, and the deliveries at shipside should be carefully noted. The commission nowhere denies the existence of such costs. Rather it seeks to belittle them as "minor" and "incidental" (R., 62), and it speaks of them as "little, if any, more" (R., 61), and "little, if any, greater" (R., 47); but despite the fact that the order it entered was an order for equal rates as between the appellants and the interior merchants, it nowhere finds that the costs of service are really the same for these two competing groups of shippers, and the conclusion it reaches is merely that

> "The record is not convincing that differences in transportation costs will justify the continuance of the present difference between the export and domestic rates" (R., 47).

Such a finding will obviously not support an order for equal rates; for if there is any difference in costs some difference in rates is plainly justified.

The finding is objectionable for another reason: it disregards the burden of proof as enunciated by this court in *United States* v. *Illinois Central Railroad Company*, 263 U. S. 515, 521:

> "To bring a difference in rates within the prohibition of section 3, *it must be shown that the discrimination practiced is unjust* when measured by the transportation standard. In other words, *the difference in rates cannot be held to be illegal, unless it is shown that it is not justified* by the cost of the respective services, by their values, or by other transportation conditions." (Italics added.)

It is not enough that the record be *un*convincing that the difference in rates *is* justified, it must *be* convincing that they are *not* justified. If the rule were otherwise, allegation and suspicion would take the place of proof.

Moreover, the commission's statement that the costs of the extra services are "little, if any, greater" is based upon a clear mistake as to the character of certain evidence that it had before it, and upon a misconception, as well, of the probative force of the evidence it supposed to exist. The car detentions under the export storage privileges are obviously the largest single item of cost among the extra services rendered to interior merchants. Of these detentions, the commission said (R., 47):

> "* * * the Galveston interests show that the average detention of cars containing export shipments is little, if any, greater at that port than the average detention of cars containing domestic shipments."

The evidence to which the commission referred is that contained in Exhibit A-186 (Exh. Bk. 224), already mentioned. That exhibit contains no information at all on car detentions at Galveston upon domestic shipments, *i. e.*, shipments moving under local rates. What the exhibit does show is average detentions on shipments to that port of the two classes that move under export rates, *i. e.*, shipments under through export bills and shipments under local bills marked "for export". That of course is quite another matter. But even if the record did show equality in average car detention between local and export movements, that would be no evidence of

equality in carriers' costs for the storage and average privileges of the two types of service. Equality in cost of those privileges would follow from equality in car detentions *for which no demurrage had been collected.* There was no evidence of that character before the commission.

In the main, the commission seemed much more interested in finding some legal justification for a disregard of service cost and service value than in establishing the equality of these under the two types of service. This is well shown by its utter disregard of the question of value; for, if there was any difference at all in point of cost, the undoubted value to interior merchants of the extra services under export rates would certainly have justified the higher charge that the carriers made. Low cost is not controlling in the face of high value. If it were, the rate for a car of silk and a car of coal would be very different from what they are.

The first reason stated by the commission to justify its disregarding service cost and service value is that

> "The export rates are not confined in their application to shipments moving on through export bills of lading, and the added elements of cost mentioned above [meaning greater free time] would vary per unit of 100 pounds, dependent on the size of the shipment."

The implications intended were (1) that the undoubted extra costs of the through overseas billing service might not be considered by the carriers in fixing rates because some interior shippers preferred to ship under local bills marked "for export" under which the extra labors growing out of the through overseas service were not involved, and (2) that the cost of the longer absolute and average free time under export rates might not be considered because its amount was variable from shipment to shipment.

But the appellants know of no principle of law that prohibits a carrier from considering variable costs in fixing rates. If that were the law, carriers would be obliged to disregard completely such items as switching within urban

switching areas and lighterage within such lightering areas as New York harbor. Yet it is beyond question that charges for such services may be added into transportation rates on the basis of average cost. Moreover, under "any guaranty" rates such as here involved, even the costs of the line haul "vary per unit of 100 pounds, dependent upon the size of the equipment" and the consequent loading of the cars; but that fact would hardly be urged to justify a disregard of line-haul costs in fixing rates.

Neither is it material that a cost may sometimes be absent altogether. As the commission says in this very case (R., 75),

> "The rates and charges of a railroad can not be based entirely on the cost for each particular character of service rendered. If such was the case, the passenger with baggage would pay more than the passenger without, and the rates to large industrial centers would vary dependent upon the character of terminal service employed, including connecting line switching."

The case would be different if grouping the service that includes the inconstant element with the service that lacks it gave rise to prejudice or preference between groups of shippers respectively needing and not needing the item in question. But that is, of course, not true here; for admittedly the same interior merchants sometimes use, and sometimes do not use, the through bill of lading. There is certainly nothing in the facts to which the commission adverts that will justify a disregard in the present case of the cost and value of the longer free time and through export billing.

For its prescription of equal rates the commission gives just one other reason that can be deemed to refer to equalization as between the interior merchants and the appellants. It says (R., 48) that

> "Usually * * * shipside rates, if higher than the domestic rates, are only enough higher to cover the strict wharf or pier charges, such as handling, from car to shipside, and wharfage. The rates under consideration are not so made. Rather there is a difference of 3.5 cents in

the rates not accounted for by the wharf or pier charges. Unloading charges are absorbed on both domestic and export shipments."

The reference to what is "usual" in the differential relationship between export and domestic rates of course refers to export and domestic rates in general, *i. e.*, to export and domestic rates on commodities other than cotton. As a reason for equal rates, the statement can have been intended to relate only to equalization as between the interior merchants and the appellants since the privilege of a port stop, such as that which constitutes the chief differential of service in the case of the "uptown" merchants, is not a usual component of the services under export rates on other commodities.

It undoubtedly is true in the case of many commodities that shipside rates are no higher than the domestic rates for the same line haul; they are in fact sometimes lower. But the reason for that is simply that cost and value of service are not generally the determinants of the level of export rates. Such rates are in general determined by the exigencies of competition among the carriers that serve the different ports and the different areas that produce a given commodity. Where such competition exists, as it frequently does, export rates tend to fall to the level of those charged by the carrier that serves the most favorably located producing area or the most favorably located port (R., 183). The corresponding local rates are frequently not subject to a like influence, and, as a result, may be above, below, or equal to, the local rates to which they correspond. There is thus no invariable relationship between shipside and domestic rates on commodities generally; the relationship is always peculiar to the particular case. If the through billing, the longer free storage, and the deliveries at shipside mean extra costs for the carriers and additional value for the exporters of cotton, it can certainly not concern them that exporters of other commodities, not sold in competition with cotton, pay shipside rates that bear a differential relationship to the corresponding local rates that is variant from the shipside domestic differential in issue here;

for such inter-commodity rate relationships can obviously not amount to unjust discrimination as between groups of shippers who sell a single commodity only. With such a question such relationships have nothing to do.

The foregoing are the only reasons that the commission gives to justify a disregard of service cost and service value as between the appellants and the interior merchants. They are not, it is believed, sufficient in law; and since the commission laid in its findings no basis for an equalization resting on service cost and service value, its order for equal rates seems to be without warrant as a matter of law.

Counsel for the commission in the court below seemed to have some apprehension that this might be true, for in his argument there he strove to find some other reason to justify the action that the commission took. He seemed to feel some apprehension about the commission's statement that

> "* * * the Galveston interests show that the average detention of cars containing export shipments is little, if any, greater at that port than the average detention of cars containing domestic shipments."

For he argued that

> "* * * even if the car detention on export traffic were substantially greater than the car detention on domestic traffic that would not be a sound reason for fixing the export rates higher than the domestic rates for the reason, as often pointed out by the commission, that demurrage charges are, in part, compensation to the carrier for detention of its equipment, and, in part, a penalty fixed to assure the prompt release of the car. If the penalty were included in the rate, each individual shipper would have to pay the penalty instead of only the shippers who detain the cars."

But the threads of logic in the foregoing argument are badly tangled. Demurrage, in both its penal and its compensatory aspect, is assessed for car detentions that exceed the absolute and average free periods allowed under a particular service. The appellants have never urged that any part of the demur-

rage collectible upon export shipments be assessed against export shippers generally rather than against those individual shippers that are guilty of such excess detentions. They do, however, insist that the car detentions, both experienced and possible, within the absolute and average free periods of a particular service are proper for consideration by the carriers in fixing the rates for that service. They are aware that the commission has often described demurrage charges as

> "* * * in part compensation to the carriers for the use of their equipment beyond such reasonable time as may be necessary to remove the traffic and in part a penalty for the failure of the shipper to act promptly in that direction" (*Export Freight Free Time*, 47 I. C. C. 162, 179),

but they are unaware of the commission's ever having said that that is any reason why the carriers are not to be compensated in the transportation rates themselves for the car detentions that do not exceed the "reasonable time * * * necessary to remove the traffic" in the particular service. The commission certainly did not say so in the present case.

Counsel for the commission also argued in the court below that no higher charge for the export rates was warranted by reason of the extra costs of the through billing and the long free time of the export service in view of the fact that cotton moving to the ports under through bills is interior-concentrated cotton. The commission's finding as to the transportational benefits of interior concentration were alluded to, as was also the testimony of certain witnesses (Pecot, R., 620; O'Donnell, R., 851), and the inference was suggested that the commission had based its equalization order upon the evidence of these witnesses and the view that it took of the benefits to carriers arising from interior concentration.

Now the actual fact is that the only finding the commission made was a finding that the transportational benefits of interior concentration were sufficient to justify the carriers in giving the privilege of transit concentration without charge at interior points, and it placed no reliance on these benefits in reaching its decision to equalize rates. It obviously could

not have relied upon them in that connection for the reason, as pointed out in the testimony upon which counsel for the commission relied (R., 853), that exactly the same benefits arise from interior concentration under local rates as arise therefrom under export rates, and if those benefits warranted lower rates for the export service in which the through billing and longer free time are given, they would warrant still lower rates for the local service from which those elements are absent.

Counsel for the commission sought also to deny the value to shippers of the through billing service and the long free time allowed at the ports on export shipments. He argued that the greater liberality of the export storage privileges was no benefit to shippers

> "* * * because, it is the result of an arrangement between the rail and ocean carriers, which arrangement has been perfected after long and careful study of the situation so that the ship owners or agents will be protected in the proper allocation of steamers. * * *"

And presumably in support of this argument he pointed out

> "* * * whatever demurrage accrues at the Texas ports on traffic moving on through export bills of lading is paid by the steamship company and not by the shippers * * *",

and that

> "* * * the carriers will not issue through export bills of lading except in connection with the steamship lines or ships whose agents have filed agreements to pay demurrage charges."

It is hard to see how these facts are relevant.

In cases of joint through service by connecting rail carriers, the burden of storage at connecting points is, it is true, usually borne by the succeeding carrier (*In the Matter of Bills of Lading*, 52 I. C. C. 671, 735); but even in such cases that is only a division of burden between the carriers themselves. The storage remains one of the elements comprising

the through service, and that is the value for which the shipper pays.

> "A through [export] bill of lading is not a joint undertaking for the through carriage of property from an interior point in this country to a foreign port. It is merely an instrument combining for the convenience of the shipper the separate and several contracts of the rail carrier to the American port and of the ocean carrier beyond." *New York Produce Exchange* v. *Baltimore & Ohio Railroad Company*, 46 I. C. C. 666, 670.

See also section 25 (5) of the Interstate Commerce Act.

> "Generally speaking the trans-Atlantic lines have no piers of their own where export shipments can be stored, and the burden of holding them falls upon the rail lines. The rail lines have no means of compelling the ocean carriers to accept the shipments, nor can they require them to bear the storage charges or to carry them as advances to be collected from the ultimate consignee in the foreign country." *New York Produce Exchange* v. *Baltimore & Ohio Railroad Company, supra.*

The commission has held that demurrage charges at the ports upon through export movements may be assessed back against the original consignor (*ibid.*, and also *In the Matter of Bills of Lading, supra,* 735); for

> "As a matter of law, neither the rail nor the ocean carrier is liable for storage charges at the port." *New York Produce Exchange* v. *Baltimore & Ohio Railroad Company, supra.*

Such an arrangement, however, is unsatisfactory to all concerned, and hence the agreements and the rule to which counsel for the commission referred in his brief below.

To induce such agreements by the ocean carriers the storage, average and demurrage provisions of the railroads' export service have had to be liberal enough to convince the ocean carriers that their demurrage burden would not be heavy. The liberality of these provisions of course results in a reversal of the burden of storage as it exists in cases of through ser-

vice exclusively by rail, for the preceding, rather than the succeeding, carrier bears the major part of the burden; but the storage is none the less one of the values that go to make the through overseas service. The railroads supply it as a part of their contribution to that service, and they are beyond question entitled to be paid therefor.

Counsel for the commission sought also to belittle the value of the through export service itself. He asserted that the only benefit arising therefrom is a "slight saving of interest" and that that is a "commercial matter * * * having nothing to do with transportation". He intimated also that the through service was shown to be without value any way by the fact "that only 10 or 12 per cent. of the cotton transported to the gulf ports moves under through export bills."

But 10 or 12 per cent. is really a large, and not a small, percentage. It must be remembered that not all the cotton that moves to the gulf ports is ultimately exported, and it must be remembered also that the bulk of what is exported is port-concentrated cotton, most of which admittedly moves to the ports under local rates. Moreover, a considerable number of interior exporters stop their cotton at port facilities for high-density compression, and not a few of these have been accustomed to move their cotton to the port warehouses under local rates leaving it to the port warehouses to make the deliveries to the ocean vessels. Also, there are still some foregn buyers too ignorant to be willing to accept drafts accompanied only by an American railroad's through export bill, and interior exporters dealing with such buyers are sometimes compelled to forgo the benefit of the railroads' through export service (R., 192-193). In the circumstances, the movement of 10 or 12 per cent. of the cotton on the through bills is a very definite indication that the bills are of real value to interior shippers.

It is, moreover, quite inaccurate to say that their value lies in their enabling interior shippers to make a "slight saving of interest". It is, in fact, hardly accurate to say that interest is saved at all; for the value of the through bills lies in

the fact that they enable interior shippers to discount drafts on their foreign buyers at an earlier date than they otherwise could do, and when a draft is discounted, interest obviously is paid by the discounter in the amount of the discount. The shipper gains, not by saving interest, but by obtaining sooner the funds that will enable him to engage in other buying and selling transactions. The shipper gets through the through export bills the opportunity of increasing the volume of his business and so of realizing profits from transactions not otherwise possible on a given capital. The value of the through bills is very real; it exceeds by far the saving of a few days' interest.

Such have been the after-thoughts of the commission's counsel. It is submitted that they lend nothing of validity to the commission's action in ordering equal rates for the appellants and the interior merchants without any finding at all on the comparative value of the services they receive and a belittlement only of the difference in the costs thereof. That the commission took the attitude it did in relation to these matters is of course in no way surprising, for there is no evidence in the record upon which a finding of equality in cost and value could possibly be based. No one denied the extra services; no one denied their value; and no one denied that there was *some* extra cost. If there was any extra cost at all, the carriers were warranted in charging *something more* than the local rates if they so desired, and this was especially so when added value was so very clear. It follows that the order for equal rates as between the appellants and the interior merchants is without warrant of law or fact and should have been enjoined.

(d) *There is no evidence to support the commission's findings of undue preference and undue prejudice as between the appellants and the interior merchants.*

The burden of proof of illegality is on those asserting illegality, *United States* v. *Illinois Central Railroad Company, supra.* The existence of additional elements of service

can not be, and is not, denied. What evidence there is to show that these elements were not worth the 3-cent difference asked is something the appellants can not quite see. There were statements of opinion even from adverse witnesses that 3 cents was not too much (West, R., 190-191; Edwards, R., 585; Witherow, R., 168), and there is the inescapable fact that interior shippers continued to buy the added elements at the 3-cent price although they could have gotten everything else they wanted under local rates and although they could, if they had wished, have secured storage facilities at the ports other than the carrier's cars and could, if they had wished, have made other arrangements for forwarding their shipments to the ocean vessels. It would not have been necessary for them to establish branches or purchase warehouses. There are public warehouses and forwarding agencies at every port. The interior merchants nevertheless chose to pay the higher rates. If the extra elements of that service were not worth the difference in price, why did they pay it? Why did they not take the alternative that exists? The inference is inescapable that the extra elements of the export service were worth to these merchants what the carriers asked. And there is no evidence in the record to show that that is not so.

II.

Even if the commission's finding of undue prejudice and undue preference were valid, and even if an equalization of rates were warranted, the commission would still be without jurisdiction to raise the rates paid by the appellants in the absence of a valid finding after full hearing that such rates were unjustly and unreasonably low and a valid finding after full hearing that the new rates by which they were to be replaced would be just and reasonable.

The considerations set forth in the first section of this brief are, it is believed sufficient to dispose of the present case so far as the equalization order is concerned; but even if the commission's finding of undue prejudice and undue preference were valid, the appellants urge that the equalization order would none the less be bad.

The Interstate Commerce Act sets up a system of limited regulation of public carriers. It is framed in pursuance of the philosophy that governmental interference with private enterprise should be kept at that minimum that is necessary to protect the public interest. The public interest, as Congress has conceived it, finds its expression in the statute in those sections which impose certain specific legal duties upon the carriers. Except in so far as such specific duties exist, the private enterprise and initiative of the carriers is unquestionably free.

With respect to the power of making rates there can be no doubt that the initiative belongs to the carrier. In *United States* v. *Illinois Central Railroad Company, supra,* a case decided nearly four years after the adoption of the statute in its present form, this Court flatly declared (R., 522) the law to be that

> "A carrier is entitled to initiate rates and, in this connection, to adopt such policy of rate-making as to it seems wise."

The power of the commission to interfere with individual rates (as distinct from its power over the general rate level) is still limited to those cases in which after full hearing it has found that the rates in question fall within some one of the categories of illegality that the statute sets up. *United States* v. *Louisville & Nashville Railroad Company,* 227 U. S. 88, 92; *Interstate Commerce Commission* v. *Northern Pacific Railway Company,* 216 U. S. 538, 544. It is not enough that the new rates fixed by the commission do not themselves fall within any of the established categories of illegality. They may lie within the zone of reasonableness, give some remuneration above operating costs, and clear confiscation; but that is not enough for their validation. *Southern Pacific Company* v. *Interstate Commerce Commission,* 219 U. S. 433, 442. For that, it must appear that the rates that were in some way broke the law. *Interstate Commerce Commission* v. *Louisville & Nashville Railway Company, supra.*

So much is the inevitable result of the wording of section 15 (1) of the statute, in which the commission's grant of power is contained. That section, however, is not wholly free from ambiguity, and it is by reason of the ambiguity that exists that the present point is being urged upon the court.

Section 15 (1) reads as follows:

> "Whenever, after full hearing, upon a complaint made as provided in section 13 of this Act, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the Commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this Act for the transportation of persons or property or for the transmission of messages as defined in the first section of this Act, or that any individual or joint classification, regulation, or practice

whatsoever of such carrier or carriers subject to the provisions of this Act, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this Act, the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged (or, in the case of a through route where one of the carriers is a water line, the maximum rates, fares and charges applicable thereto), and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation or transmission other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed."

It is obvious that this section provides expressly for two conditions precedent to the powers that it grants to the commission:

(1) a full hearing upon a complaint or under an order;

(2) a determination that there is a violation of the statute.

And it is equally obvious that the grant that is dependent upon these conditions includes the following specific powers:

(1) determining and prescribing just and reasonable rates, fares, and charges;

(2) determining and prescribing maximum or minimum, and maximum and minimum, rates, fares, and charges;

(3) determining and prescribing just, fair, and reasonable classifications, regulations, and practices;

(4) issuing orders to carriers to cease and desist from violations found to exist or to be about to exist;

(5) issuing order to constrain the carriers for the future to obedience to prescriptions under (1), (2), and (3) above.

Now, if the language of the statute were taken literally, the commission would have jurisdiction to exercise all of these five different powers in every case in which it found any violation of the statute whatsoever. It could, for example, prescribe just and reasonable rates in a case involving the lawfulness of a regulation or a practice only—*e. g.*, a practice of making allowances. But such a result seems wanting in logic, and it is apparent at once that the occurrence of the two conditions precedent that the statute sets cannot possibly be construed to make available in every case all of the powers that the statute lists. Only those can be deemed available that are appropriate and necessary to remedy the particular illegality that the commission finds. This limitation is stated expressly in the case of the power to issue "cease-and-desist" orders, and it is submitted that it must be read into the prescriptive and constraining powers as well. In every case, it would seem, the question is what powers are necessary and appropriate for the purposes of remedy, and the first step toward an answer to that question will always be a clear discernment of the nature of the illegality that is found.

In the present case the finding of illegality is simply that the differential between local and export rates results in undue prejudice to interior exporters and to the so-called "uptown" port exporters by reason of the fact, also found, that the differential gives an undue preference to the appellants. There is no other finding. The commission distinctly states in both of its reports that the reasonableness of the two sets of rates was not in issue (R., 44, 49, 65).

Now, it is too well settled to admit of argument that "undue prejudice and preference", or "unjust discrimination", is

a category of illegality wholly separate and distinct from that of "unjustness and unreasonableness". As this court said at page 524 of its opinion in *United States* v. *Illinois Central Railroad Company, supra:*

> " * * * the mere fact that * * * [a] rate is inherently reasonable, and that the rate from competing points is not shown to be unreasonably low, does not establish that the discrimination is just. Both rates may lie within the zone of reasonableness and yet result in undue prejudice."

See, also, *American Express Company* v. *Caldwell,* 244 U. S. 617, 624; *Interstate Commerce Commission* v. *Baltimore & Ohio Railroad Company,* 145 U. S. 263, 277.

"Justness and reasonableness" has come to be understood as relating to the amount of a single rate, taken as a whole and in relation to other rates generally. "Undue prejudice and preference", or "unjust discrimination", relates, on the other hand, to the differential relationships between particular rates. The greater complexity of the former concept has led to the recognition that there is "a zone of reasonableness—a flexible limit of judgment that belongs to the power of fixing rates"; and since the absence of "unjust discrimination" is generally deemed to depend upon a differential in rates that accurately reflects the difference in cost or value of the respective services for which the particular rates are charged, it often happens that rates which, standing by themselves (or, more accurately, in relation to rates in general), would escape condemnation nevertheless are held to work as between the shippers respectively paying them "undue prejudice" or "undue preference" within the meaning of section 3. The differential relationship that will escape condemnation under that section is deemed to be a constant, invariant whether the rates be above, or below, or at, the level that is deemed to be "just and reasonable" within the meaning of section 1. Thus, in the *Illinois Central* case, cited *supra,* it was pointed out at page 521 of the opinion that the discrimination therein existing could be removed

or by raising the rate from Fernwood,

"* * * either by making the Knoxo rate as low as that from Fernwood, or by giving both an intermediate rate."

With the nature of "undue prejudice and preference", or "unjust discrimination", clearly in mind, it is not hard to see which of the five powers given by section 15 (1) is appropriate to its remedy. The power that is appropriate is the power of making an order to "cease, and desist" from practicing, the "unjust discrimination" that has been found to exist. It was, in effect, an exercise of that power that this court approved in the *Illinois Central* case, *supra*, for the alternative order therein entered covered all possible alternative modes of removing the discrimination and left the carrier free to choose which it preferred to adopt. In the present case the commission has done something quite different. It has undertaken to command that the discrimination it has found shall be removed by increasing the level of the local rates by 1 cent and by lowering the export rates, exclusive of wharfage, to the level of the new local rates so fixed. That, the appellants submit, the commission had no jurisdiction to do on the basis of the hearing held and findings made in the present case. They submit that the power to prescribe rates is so inappropriate to a proceeding, strictly and solely under section 3 that it must be deemed not to be given under the terms of the statute. It is inappropriate to such a proceeding because it is unnecessary for the remedy of the only type of illegality that can possibly be found; because if rates can be fixed without a hearing and determination upon the question of reasonableness, they may turn out to be unlawful under section 1; because the right of choice among the alternative modes of removing an unjust discrimination belongs to the carrier; and because the right that the carrier shall be allowed that choice belongs, by consequence, to the shipper.

That the power of fixing rates is unnecessary in section 3 proceedings is shown by the fact that unjust discriminations have regularly been remedied in the past without its

use. *St. Louis Southwestern Railway Company* v. *United States*, 245 U. S. 136; *United States* v. *Illinois Central Railroad Company, supra;* and *cf. Great Northern Railway Company* v. *Minnesota*, 238 U. S. 340. The last case, though dealing with the order of state commission, is especially noteworthy in its application of the criterion of what is necessary to cure the illegality found. See especially page 346 of the opinion.

It was argued, however, in the court below that "from the beginning" the commission has interpreted section 15 (1) as giving it the power to prescribe specific rates as a means of removing undue prejudice. Two of the commission's reports were cited. *Arkansas Jobbers Association* v. *Director General*, 59 I. C. C. 662, 669; *Ridenour-Baker Mercantile Company* v. *A. T. & S. F. R. R. Co.*, 113 I. C. C. 629, 634. In the first case, reasonableness was an issue; in the second there is only a dictum, the power claimed was not exercised. Certain cases from this court were also cited: *American Express Company* v. *Caldwell*, 244 U. S. 617; *H. E. & W. T. Railway Company* v. *United States*, 234 U. S. 342; *Wisconsin R. R. Commmission* v. *C. B. & Q. R. R. Co.*, 257 U. S. 563; *New York* v. *United States*, 257 U. S. 591; *United States* v. *Merchants Association*, 242 U. S. 178. The last of the above cited cases dealt only with a revocation of a permission previously granted by the commission under the "long-and-short-haul" clause. That is hardly in point. The others are cases arising under section 13 (4) which specifically requires the commission to fix rates to remove discriminations in cases in which an intrastate rate is one of those concerned. That would seem to be a sufficient distinction; but counsel for the commission argued below that the power must exist in the present case *a fortiori* since

> "Under section 13 (4) one of the related rates is intrastate in character and over it the commission has no jurisdiction *per se.*"

But the conflict of jurisdiction is doubtless the very thing that is at the bottom of the difference in the statutory provisions as to the commission's power, for where the carrier's choice is subject to the constraining power of a state it is desirable that it be able to justify departures from state orders by reference to specific orders from the federal commission.

Various other arguments were advanced in the court below in attempted refutation of the position that the appellants take. It was argued that it would be immaterial that the rates set might be in violation of section 1 since the shipper could file a complaint on the basis of their unjustness and unreasonableness. But if this were true, it would hardly be a desirable thing procedurally that success under section 3 could breed another proceeding under section 1. If the commission intends to fix rates, the interests of all parties will be served by requiring it to order an investigation into the question of reasonableness in order that it may determine accurately and definitely that the rates it fixes are not unlawful.

The assertion was also made by counsel for the commission that

> "while * * * the reasonableness of the rates *per se* was not in issue before the commission * * *, the *relative* reasonableness of the rates was in issue";

and "relative reasonableness" was defined by him as the "reasonableness of the shipside rates in their relation to the city-delivery rates". This apparently was the position of the court below which held (R., 140):

> "The court is convinced that while under Sec. 3 under which this proceeding was taken, it was competent for the Commission to not only forbid the discrimination, if there was one, but to fix a rate which it found to be just, fair and reasonable which would do away with the practice condemned, it is essential to the fixing of such a rate that a hearing be had and a finding made upon its reasonableness.
>
> The full court is, however, of the opinion that a fair construction of the words 'just and reasonable' as used

in the context above quoted, permits the conclusion that in a discrimination case under Sec. 3 such as this is, it is only necessary that the rate fixed upon to remove the discrimination be found to be just and reasonable for that purpose, and that it is not necessary that it be found just and reasonable per se."

"Justness and reasonableness for the purpose of removing discrimination" seems indistinguishable from "relative reasonableness" as defined by counsel for the commission; and it would seem that any pair of rates, whatever their level as a pair, that bore to each other the prescribed differential relationship (in this case, parity) would be "just and reasonable" in this sense. It seems therefore rather clear that this new variety of "justness and reasonableness", which is quite unknown to the statute, is nothing at all but "absence of unjust discrimination" by another name. These words will not disguise the fact that the commission in the present case selected a *particular* level for the supposedly non-discriminatory rates for which its order called. That was unnecessary, since a pair of equal rates at any level would equally well have cured the discrimination that it thought existed.

Finally, it was argued that there could at least be no objection to the fixing of the rates at a particular level in the present case for the reason that in *Galveston Commercial Association* v. *Alabama & Vicksburg Railway Company*, 77 I. C. C. 388 (Docket No. 11965), both rates had been fixed as reasonable rates, and that any rate between them must therefore also be reasonable since it must necessarily fall within the zone of reasonableness recognized in the decisions of this court. One difficulty with that argument is that the old local rates were fixed by the commission in the proceeding cited as maximum reasonable rates. By reference to the report therein, the court will find that the export rates, including wharfage, to the Texas ports from Oklahoma points were approved as just and reasonable, and it was held that the local rates from such points to the Texas ports would be unjust and unreasonable if they were in excess of a level five cents below

the export rates. The local rates to the Texas ports from Arkansas and Louisiana points were similarly fixed, and a finding made that local rates in excess of the levels fixed would be unjust and unreasonable. *I. & S. Docket 1858,* 85 I. C. C. 5, 14, should also be consulted in determining the status of local rates to the Texas ports from Louisiana points. In the light of these facts the argument based on the doctrine of a zone of reasonabless falls to the ground.

The argument also completely misconceives the nature of the doctrine of the zone of reasonableness. The zone of reasonableness is not a zone in which the commission's wishes supersede the private enterprise and free choice of the carrier; it is a margin of tolerable error allowed to those persons whose task it is to fix railroad rates, whether those persons be railroad managers or interstate commerce commissioners. The doctrine of the zone of reasonableness can in no way justify what the commission did; for even if both the rates herein concerned are to be taken as reasonable rates for both types of service, and even if the necessary consequence of that fact is that all intermediate rates are also reasonable for both services, it still remains true that if any equalization be proper, it is for the carriers to choose the point at which it shall take place, subject, of course, to the limitation that the level chosen must be just and reasonable and otherwise lawful. If the carriers had never broken the law by charging unjustly discriminatory rates, as it is assumed for the sake of argument they have, the right of choice as to the rate level would indubitably be theirs, always within the limitations that the law prescribes. *United States* v. *Louisville & Nashville Railway Company, supra,* 92; *United States* v. *Illinois Railroad Company, supra,* 522. A breach of the law does not narrow the scope of such managerial liberty; there is no such penalty. The only consequence that the law contemplates is an administrative remedy for the breach committed; the commission is wholly without jurisdiction to do more than cure the illegality that it finds. A prescription of specific rates on the basis of a

section 3 finding alone unquestionably does do more; it enforces upon the carrier a particular rate policy and that certainly is not required to remove a discrimination in rates. The commission should remember that.

> "A carrier is entitled * * * to adopt such policy of ratemaking as to it seems wise." *United States* v. *Illinois Central Railroad Company, supra;*

and an interference with that right that is in no way necessary to the ending of a breach of the law is arbitrary and beyond the scope of the commission's power.

III.

The commission's prohibition of allowances to the appellants for substituted transportation from their warehouse to the adjacent wharves is arbitrary and in violation of law, and should be enjoined.

In the statement of facts it was mentioned that the appellants and many of the other port merchants are accustomed to make their own deliveries from the port warehouses to shipside. Only a few of the port shippers use the carriers' service. These few are those who use the warehouses that are furthest away from the wharves.

The commission's decision on the question of allowances relates to allowances to be made to the port shippers under the equalized rates for the making of such deliveries to shipside. The commission held (R., 68) that allowances might be made (1) to the so-called "uptown"* shippers in all cases in which they made their own deliveries to the wharves, and

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*The commission used the word "uptown" to designate any warehouse not in the neighborhood of a wharf whether on the waterfront or not; and it used the word "waterfront" to designate only those warehouses on the waterfront which were near a wharf.

(2) to the appellants in those cases in which they delivered shipments to wharves other than those adjacent to their warehouses; but it said that

> " • • • upon cotton delivered to shipside from and by water-front warehouses or compresses over adjacent wharves or piers operated as a part of or in conjunction with such warehouses or compresses a different condition exists. The hand or electric trucking, or movement by overhead trolley, from the part of the waterfront facility known as the warehouse or compress to that part known as the wharf is not a substitute for rail transportation, but is an intra-plant movement just the same as the handling of cotton from the interior or an uptown warehouse to the railroad car or dray is an intra-plant movement."

It then added:

> "No allowances may lawfully be made for these intra-plant movements."

This prohibition of course covers the great bulk of the appellants' shipments. They submit that its necessary effect is to subject them to undue prejudice and to accord to their "uptown" port competitors an undue preference within the meaning of the law; that, in consequence, it is in excess of the powers of the commission; and that its enforcement should, accordingly, be enjoined.

It cannot be denied that there is a differential in service between the shipments of the appellants under local rates and those of the "uptown" merchants under export rates that consists of an extra port delivery—*i.e.*, the delivery to shipside with the extra costs that it necessarily entails. (See *supra*, p. 23.) The inevitable effect of equalization is, then, that the appellants and their "uptown" competitors pay equal rates for unequal services; but the inevitable effect of the commission's position in respect to allowances, when added to equalization, is that the appellants and their "uptown" competitors pay unequal rates for equal services. For when the "uptown" shipper makes his own delivery to shipside, he

cuts his service demand down to parity with the service demand of the appellant; he declines to ask the port transit stop, or second delivery, that constitutes the excess of service on his export shipments. The services sought and received by the appellants and such a merchant are then indistinguishable; yet the appellants will then pay a higher rate—higher by the amount of the allowance that they do not get.

There is no possibility of asserting that the services in the case supposed are unequal except under a complete misconception of the whole situation. There are times in the reports when the commission seems to think of the appellants' warehouses as *at* shipside and of the warehouses of their "uptown" competitors as mere way stations *en route* thereto. Physically, that is untrue. Inspection of the terminal maps of the ports will show that the various "uptown" warehouses are scattered all over the city switching areas. Physically, some are in "back-haul" positions, and the positions of others are physically "out-of-line". Some so-called "uptown" warehouses are just as much on the waterfront as those of the appellants. There are no doubt some that are physically *en route;* but that certainly is not the physical position of the "uptown" warehouses, as a group, in relation to shipside or the warehouses of the appellants. And when it comes down to the law, the only aspect of the physical situation that is really important anyway is the fact that *all* the port warehouses are within the city switching areas. It must be remembered that the same rate should apply *for the same or equal services* to all shippers on the same road within the switching limits of a single municipality.

The appellants again insist that naturally their position is more favorable than that of their "uptown" competitors, for their proximity to the ocean carriers makes it unnecessary for them to ask the port transit stop, or second delivery to shipside; or, what is equally a natural advantage, their proximity enables them to make their own deliveries more cheaply than their "uptown" competitors. They therefore submit that it is bad enough to lose the advantage in rates

which should naturally be theirs, but that it is past all conscience to be subjected to a positive disadvantage when their "uptown" competitors choose to buy only the same services as they. They submit that that result is "*unjust* discrimination" in the fullest sense of the term.

It should be observed that that result would still follow even if they were to receive allowances unless the allowances received were as large as those paid their "uptown" competitors. The only system of making allowances under the equalized rates that would avoid such unjust discrimination toward the appellants would be that of granting flat allowances of a specified sum to all shippers whatever their location within the city switching area. There is much that might be said for that solution; for the major part of the service that the carriers render in making the second delivery to shipside is that of the car detention at the concentrating warehouse during the loading with merchandised cotton, the actual switching-out from the warehouse siding, the actual switching-in to the siding at the pier, and the car detention there while unloading takes place. The actual intra-city linear haul from warehouse to shipside is by comparison a trifle. Nevertheless, the appellants recognize that a system of flat allowances might not be deemed "just and reasonable" under paragraph (13) of section 15 of the statute. They therefore argued in the alternative before the commission that allowances should either be abolished or given to all. They recognize that the abolition of allowances would put a serious strain on the carriers' equipment at the peak of the cotton movement, for they could then no longer resort to allowances to procure the early release of their cars by port exporters; but that fact does not make proper the discrimination against the appellants that the commission's allowance order produces or that any allowance order not providing for a flat system will necessarily produce. Rather, it indicates that the order for equalization is itself fundamentally wrong.

But that does not end the vice of the commission's order, for even if allowances be proper in the present case, the appel-

lants are nevertheless still entitled to receive something for the substituted services on the cotton they deliver to the piers adjacent to their plants. The commission's reasons for its prohibition of allowances in such cases is contained in a single sentence (R., 68):

> "The hand or electric trucking, or movement by overhead trolley, from the part of the waterfront facility known as the warehouse or compress to that part known as the wharf is not a substitute for rail transportation, but is an intraplant movement just the same as the handling of cotton from the interior or an uptown warehouse to the railroad car or dray is an intraplant movement."

The commission says that the movement effected by appellants "is not a substitute for rail transportation." Whether it is or is not is certainly the crucial question. *United States* v. *Baltimore & Ohio Railroad Company,* 231 U. S. 274. And as pointed out by this court in the case just cited, that is to be determined by whether or not the railroad was obligated under its tariffs to perform the service that the recipient of the allowance has performed for himself. If it was so obligated, there is no escaping the conclusion that the service performed is "a substitute for rail transportation."

Just how it can be denied in the instant case that under the equalized rates the carriers are obligated to move appellants' export shipments from their warehouses to the berth of the vessel destined to receive them is something the appellants do not understand; for that is the obligation specifically undertaken in the tariffs. If the appellants called for that service, just how the carriers could refuse it is not easy to see. They could certainly not assert that a delivery at shipside had been made, for that would be neither actually nor legally so. If it were, the appellants could not call upon the carriers for movements from their warehouses to piers not adjacent to their warehouses, and they could, in consequence, receive no allowances in case they themselves made deliveries there; yet the commission says that upon such deliveries

the appellants may receive allowances. What excuse other than this could possibly be offered? The carriers surely would have to perform if performance were asked.

And performance would entail exactly the same labor of switching-in and switching-out as if the appellants' warehouses were remote from the wharves. The detention of equipment would be the same. The only difference would be in the length of the intra-city linear haul. The length of that haul would unquestionably be the least important element in the service costs entailed. The fact that it would be very brief is admitted, but that alone is no basis for a prohibition of an allowance that is proper in amount. In *Louisiana & P. Ry. Co.* v. *United States*, 209 Fed. 256, the commission had forbidden allowances to mills located within 1000 feet of a carrier's lines. In enjoining enforcement of the order, the court said:

> "As we have already stated, the possibility, particularly in the case of short switches, of an abuse or illegal use by a railroad of the right granted to it by statute to make an allowance for services connected with transportation which, in its discretion, it permits the shipper to perform, does not vest the Commission with power absolutely to forbid its exercise as an unjust discrimination. It may cut down the compensation if it be too high; it may enforce any reasonable regulations to prevent unjust discrimination, but it may not forbid such payments as unlawful because the service is relatively either small or great."

There can be no doubt that the appellants are entitled to receive something; and in view of the fact that the major service elements would be the same if appellants called for performance, the sum ought certainly to be substantial.

The commission says that the movement "from the part of the waterfront facility known as the warehouse or compress to that part known as the wharf * * * is an intraplant movement." The implication seems to be that the appellants' warehouses and the adjacent wharves are in each case one indivisible plant. That certainly is not true in the case

of the warehouse of the Turning Basin Compress Company, for the wharf adjacent to it is not even the property of that company; it belongs, instead, to the City of Houston. The ownership of the warehouses and adjoining wharves, it is true, is common in the case of the Houston Compress Company and the case of the Ship Channel Compress Company, but the two types of facility are no more a single plant in either case than any other dissimilar enterprises in common ownership. The warehouses are a part of the equipment of the appellant cotton merchants for engaging in the cotton trade; the wharves do a general wharf and dock business and while more cotton passes over them than any other commodity, other commodities are received, notably coffee and sugar. It would, moreover, not be material even if they were one plant, for even a movement within a single plant may be a "substitute for rail transportation" in the sense requisite to validate an allowance. *United States* v. *Diffenbaugh, supra.* The grain elevation therein concerned occurred wholly within the plant of the shipper.

The commission says that the movement that the appellants effect is "just the same as the handling of the cotton from the interior or an uptown warehouse to the railroad car or dray." It mentions that the method of movement is by "hand or electric trucking or * * * overhead trolley;" but it can hardly have meant to say that the mode of movement is important. What it very probably did mean to say was that the labor involved for the appellants was no different and no greater than they would have to perform in any event in merchandizing their cotton; but even if this were a fact, as it is not, it would be quite irrelevant. This court has already held that it is immaterial that a shipper gains an advantage of lessened cost in his merchandising processes by performing them simultaneously with services for which he receives allowances from a carrier. The *Diffenbaugh* case is again in point.

The fact is there is not a single reason to support the commission's prohibition of allowances to the appellants for movements from their warehouses to the adjoining wharves, and

the enforcement of that prohibition should therefore certainly have been enjoined by the court below.

That court seems, indeed, to have recognized the justice of the appellants' complaint in reference to the commission's position on allowances; but it nevertheless refused an injunction on the ground (R., 138)

> "* * * that it is time enough for a shipper to complain of an allowance or disallowance when there has been an order on it";

and (R., 139)

> "* * * that whatever the order of the Commission ought to be in a specific instance upon a specific claim or allowance, or disallowance, or whatever relief might be obtained against such orders, the report of the Commission is so delivered and the order on it so entered that there is no matter now presented for injunctive relief."

It then cited *Proctor & Gamble* v. *United States,* 225 U. S. 282, and certain other cases in which injunctive relief against orders of the Interstate Commerce Commission has been refused on the ground that the orders concerned were merely negative.

If the commission had done no more than refuse to direct the carriers to grant allowances, the case would unquestionably be within the "negative-order" doctrine. If the commission had merely declined to act, there would be nothing to enjoin. *Lehigh Valley Railroad Company* v. *United States,* 243 U. S. 412. There would in such a case be no real exercise of any of the powers that the commission has. *Manufacturers Railroad Company* v. *United States,* 246 U. S. 457. But the commission went further; it forbade allowances to the appellants for the shipside deliveries they make from their warehouses to adjacent wharves. It declared flatly (R., 68),

> "No allowances may lawfully be made for those intra-plant movements."

This "constrains the railroad companies to obedience unless annulled or suspended by judicial decree"; it is not a negative order within the doctrine of the decisions of this court. *United States* v. *Illinois Central Railroad Company*, 244 U. S. 82, 89; *Procter & Gamble* v. *United States*, 225 U. S. 282, 293.

It remains only to notice the contention that there is no order at all, either negative or affirmative. This argument is based not on the substance of the commission's decision but upon the mere wording of the formal order simultaneously entered. That formal order is reprinted in the record at pages 80-81. It will be observed by the court that allowances are not specifically mentioned in any part of the order, and that the ordering portions relate to "undue prejudice and preference *found* * * * *to exist*." The commission did not find that undue prejudice and preference *did* exist in relation to allowances, but it clearly indicated that it thought, it, or, or least, some other type of illegality, *would* exist if allowances were paid to the appellants for deliveries from their warehouses to the piers adjoining, and in its report it distinctly forbade the making of allowances for such deliveries. The court will also observe that the formal order simultaneously entered refers to the report (R., 80) in which the commission's prohibition is contained, and recites that the

> "* * * said report and the reports of and orders of February 2, 1923, and June 23, 1925, are hereby referred to and made a part hereof."

In view of this recital, it would seem that the prohibition in the report is indisputably a part of the formal order. The position of the court below seems over-technical. Counsel for appellants would feel themselves on very unstable grounds if they were obliged to rely upon such a technicality to defend a carrier guilty of disobedience to the prohibition that the report contains. They submit that such a technicality is no valid ground whatsoever for the decision below.

IV.

The whole aim of the commission was to equalize conditions among exporters of cotton.

The sole effect of its order in all its aspects was to deprive the appellants of the economic advantage of their superior location for engaging in cotton export.

The order exceeded the powers that an arm of the government can constitutionally exercise.

In the court below counsel for the commission argued that the action of that body in the present case had been "based squarely upon a comparison of the two types of service". The position of the appellants is (1) that it is a legal impossibility to base the action that was taken upon a comparison of the two services, (2) that, as a matter of actual fact, the commission did not even purport to do so, (3) that the whole aim of that body was to equalize conditions among exporters of cotton, and (4) that the sole effect of the commission's order in all its aspects was to deprive the appellants of the advantage of their superior location for engaging in the cotton export trade. The first of the above propositions has been discussed; the other ~~two~~ three will be treated in the remaining pages of this brief.

It must be borne in mind that the commission's order undertook to equalize rates for the two types of service. The commission was certainly aware that an order for equal rates could not stand except upon a finding, supported by evidence, that the costs to the carriers *and* the values to the shippers were equal in the services for which the rates were ordered. The commission knew the language used by this court in *United States* v. *Illinois Central Railroad Company,* 263 U. S. 515, 524:

> "* * * The difference in rates can not be held to be illegal unless it is shown that it is not justified by

> the cost of the respective services, by their values, or by other transportation conditions."

The language there used is plain; it is in the alternative; any one of the three—cost, value, or "other transportation condition",—is sufficient to *validate* a carrier's rate. Yet the commission only belittled the difference in cost and made no finding at all on value. The commission also knew that

> "To bring a difference in rates within the prohibition of section 3, *it must be shown that the discrimination practiced is unjust* when measured by the transportation standard." *United States* v. *Illinois Central Railroad Company, supra.*

Yet the commission spoke only of the lack of proof of legality:

> "The record is not convincing that differences in transportation costs will justify the continuance of the present difference between the export and domestic rates" (R., 47).

That is not the language of an equalization of rates that rests upon an application of the transportation standard.

And if the commission rested its decision "squarely on a comparison of the two types of service", why did it in the very next line grope for some further support, saying (R., 47):

> "Especially is this so, when it is considered that differences in transportation costs have been generally disregarded in keeping the Texas ports and industries at these ports on a rate parity?"

This is certainly a clear intimation of its opinion that the "transportation standard" in the case before it was somewhat less than controlling and not strictly to be regarded in reaching its result.

The appellants urged that an order for equalization in disregard of service cost and service value would be unlawful

and void under the decisions of this court, and the following cases were cited in support of that contention: *Interstate Commerce Commission* v. *Diffenbaugh, supra; Penn Refining Company* v. *Western New York & Pennsylvania Railroad Company,* 208 U. S. 208; *Baltimore & Ohio Railroad Company* v. *United States,* 231 U. S. 274. The commission replied that the rate adjustment before it was "somewhat unusual" and implied that the cases cited were therefore not relevant. It said (R., 48):

> "As contended by the waterfront facilities it is not our function arbitrarily to equalize rates in such manner as to deprive any industry of the legitimate advantage of its location. But we do not think that such a situation is presented. Rather the question before us is whether we shall permit this somewhat unusual adjustment of rates to be continued now that the conditions which previously justified it have changed, and it is shown that it gives to large and powerful interests an advantage over their competitors."

In the passage immediately following, the commission explained what it conceived to be "unusual" in the rate adjustment before it. It said:

> "Usually the same rate applies to all industries on the same road within the switching limits of a municipality, and shipside rates, if higher than the domestic rates, are only enough higher to cover the strict wharf or pier charges, such as handling, from car to shipside, and wharfage. The rates under consideration are not so made. Rather there is a difference of 3.5 cents in the rates not accounted for by the wharf or pier charges."

Here, if anywhere, one would have expected the commission to say that the differential in rates was *illegal,* not "unusual", because of incongruity with the comparative costs and comparative values of the two types of service; instead reasons were given in an effort to justify a disregard of cost and value in the particular case. The conclusion is inescapable that the commission knew that its decision could not

rest upon an even-handed application of the "transportation standard", and that it did not seek so to rest it.

Moreover, the commission doubled back on each of the reasons that it gave to justify its departure from the standard of decision that this court has set. It professed to be equalizing the rates for the local and export services (1) in order that one rate might apply to all industries on the same road within the switching limits of a single municipality and (2) in order that the local-export differential for cotton rates might be brought into line with what it asserted was the usual local-export differential for commodities generally; but before it finished, it had authorized and approved the payment of allowances to "uptown" merchants for making their own deliveries to the ships and had at the same time forbidden the payment of such allowances to appellants for deliveries made from their warehouses to adjacent wharves. Yet with the making of their own deliveries to the ships, the services demanded and received by the "uptown" merchants fall to undeniable parity with the services demanded and received by the appellants; in other words, the "uptown" merchants cease to ask the export service and ask only the local service. And by virtue of their receipt of an allowance that is forbidden to the appellants upon shipments to their warehouses that they themselves deliver to adjoining piers, the "uptown" merchants are able to get that local service at a rate that is less than that paid by the appellants by the amount of the allowance that the "uptown" merchants get. It is fair, therefore, to ask just what has become of the commission's ideal of a single rate for all industries on the same road within the switching limits of a single municipality. It is fair, also, to ask just what has become of its ideal of parity between local rates and export rates with wharfage excluded; for it is obvious that the receipt of the allowances also gives the "uptown" merchants a local rate that is lower than the interior shippers' export rate by an amount that is more than "enough * * * to cover the strict wharf or pier charges" at the port. And it would, in addition, be hardly unfair to

ask just where these ideals were on the two prior occasions upon which the commission gave the stamp of its approval to the differential that it has herein condemned. As Commissioner Hall said in his dissent (R., 51),

> "The only apparent change is the recent location of warehouses and compresses on the waterfront of Houston and Galveston. * * * If that location has some advantages, it does not follow that the carriers may be called upon to cure them by readjustment of rates. * * * Nothing that was said before is here unsaid. We simply forget it or ignore it. If we were right then, we can not be right now."

The commission talked of *free* first concentration in transit (R., 47); it insisted that first concentration in transit could be had without charge on local movements, as it can; and it implied that the carriers must therefore give it without charge on export movements even at the ports (R., 48). Yet before it finished, it fixed the equalized rates at a point 1 cent above the pre-existing level of the local rates in order

> "* * * to compensate [the carriers] for services rendered in handling from the uptown facilities to the water front the class of shipments nof [*i. e.*, formerly] delivered to such facilities at city delivery rates [and, of course, thereafter formerly delivered to shipside by the 'uptown' facilities themselves] * * *."

Apparently, there was no objection to a charge for first concentration at the ports so long as the appellants contributed toward its defrayment an amount sufficient to equalize them commercially with those of their competitors who alone asked that service.

It is no injustice to the commission to say it had no really consistent idea of what it was about except a vague notion that the three groups of cotton shippers ought somehow to be equalized in cost of reaching the ocean carriers. It seemed to conceive that its prior approvals of the differential it presently condemned could be justified by the fact that

there were, at the dates of those approvals, no warehouses at the ports that were located so advantageously for direct dealing with the ocean vessels as are those presently owned by the appellants; and it seemed to think that the appellants change of location could justify its condemnation of what it previously approved. It said (R., 59-60):

> "In Louisiana Cotton, 46 I. C. C. 451, and Galveston Commercial Asso. v. A. & V. Ry. Co., supra, we found in effect that ship-side rates on cotton to New Orleans and the Texas ports, exclusive of wharfage charges, should exceed the rates for deliveries at uptown warehouses or compresses by an amount sufficient to cover the average cost of handling the cotton from the uptown warehouses and compresses to ship-side. *At that time the important warehouses and compresses at the ports were all located back from the water front and the relationship there prescribed between the city-delivery and ship-side rates substantially equalized merchants at the ports who drew their cotton from the interior, merchandised it at the uptown facilities and then moved it to ship-side, with interior merchants who shipped their cotton direct to ship-side.* This relationship between the city-delivery and ship-side rates proved generally satisfactory until water-front facilities were erected first at Galveston and later at Houston. These new water-front facilities were and are within the switching limits of the respective cities and deliveries thereat were and are made by respondents at the city-delivery rates. *Merchants using these water-front facilities thus gained an advantage over merchants using interior or uptown facilities,* for they secured delivery of their cotton practically at ship-side at the lower city-delivery rates, whereas interior merchants shipping direct to ship-side were compelled to pay the higher ship-side rates, and merchants using the uptown facilities were compelled either to pay the ship-side rates if transit were availed of at the port or bear the cost of getting their cotton from such facilities to ship-side. Later, in order to compete with the water-front facilities, the uptown compresses were compelled to shrink their charges sufficiently to cover the cost of getting the cotton from their presses to the water-front. *Thus the conditions which*

gave birth to the existing relationship between the ship-side and city-delivery rates were disrupted, a realignment of interest was created and the present litigation precipitated." (Italics added.)

The commission's remark (R., 47) that

"* * * differences in transportation costs have been generally disregarded in keeping the Texas ports and industries at these ports on a rate parity * * *",

seems to indicate that it thought that some accretion of power would result to it by reason of such facts if true. It was right enough that the inter-gulfport export cotton rate relationships do not, and did not, reflect actual differences in service costs or service values, for those relationships are the result of competition amongst the carriers serving the different ports. But it is not easy to see how that fact could make a disregard of the transportation standard proper as between the various classes of cotton exporters herein concerned. Interior exporters, "uptown" port exporters, and "waterfront" port exporters are classes that cut quite across those based on the ports through which the exporters ship. An equalization of the several ports would equalize each interior exporter with every other interior exporter without discrimination based upon the port through which each might respectively ship, and it would have the same effect upon "uptown" port exporters and "waterfront" port exporters; but it would leave the rate relationships based on the cross-classifications exactly where they were before—lawful or unlawful as the case might be.

There remains the assertion that the transportation standard had been disregarded to keep the individual "industries" on a rate parity. It will be assumed that by "industries" cotton merchants were meant, for an equalization of other industries would certainly not be relevant. Now, the actual fact is that no such equalization was ever attempted. The differential herein concerned originated with the carriers (R., 331-332); and when they fixed the rates that estab-

lished it, they fixed them, not by a consideration of what would equalize shippers, but by ~~assuming~~ summing the local rates and the shipside switching charge to assure to themselves some compensation for the port concentration privilege when that should be claimed upon export movements (R., 331-332). The mode of the making clearly appears in *Louisiana Cotton*, 46 I. C. C. 451. It is true the carriers pointed out in that case that there could be no prejudice since all shippers were equalized *in the matter of rates*, as they undoubtedly were *when they all asked the full railroad service to shipside;* but the carriers never professed to have fixed the 3-cent differential to accomplish a commercial equalization among their shippers.

But the point need not be labored; for even if the carriers had departed from the transportation standard, that would give the commission no power to compel a continuation and extension of that departure. The carriers would not by virtue of that departure have abdicated their right to rates commensurate with the transportation standard whenever they should be ready to charge them. That was squarely decided by this court in *Southern Pacific Company* v. *Interstate Commerce Commission*, 219 U. S. 433.

From that case it follows also that such temporary aberrations by carriers from the standard of service cost and service value in fixing rates in no way destroy the rights of shippers to have their advantages in location respected except in so far as impairments may result from the stresses of carrier competition. The power of the commission in proceedings under section 3 is the same in such cases as it is in others. The difference in rates may be condemned only if the difference is not justified by a difference in cost or value of the respective services and if a departure from that standard is not excused by some other transportational consideration. The power of the commission under section 3 is the same whatever the absolute level of the rates concerned. *United States* v. *Illinois Central Railroad Company, supra.*

In the present case, merchants who claim the port privilege on export movements assert that they suffer prejudice by reason of the fact that the appellants pay the lower local rates on movements from the producer to their port warehouses; but these so-called "uptown" merchants can also move cotton into their port warehouses under local rates if they so desire, and they can have the same interior concentration privilege upon such movements that is open to the appellants. Their complaint simmers down to this: they have to pay for the port concentration stop, or second port delivery, that they claim on export movements, whereas the appellants have no such expense on their export cotton. But the reason the appellants have no such expense is simply that they do not ask that extra service of the carriers, and they do not ask it because, by reason of their location in proximity to the ocean carriers, they do not need it. That is the essence of the locational advantage that they enjoy over their "uptown" port competitors: they ask one delivery at the port instead of two. The rate relationship in issue only reflected that difference in service demanded, and that difference, in turn, is their natural advantage.

It is apparent that much the same situation exists as between the appellants and their interior competitors. By reason of their interior locations remote from the ocean lines, the interior merchants can not deal directly with the ocean carriers. They need, in consequence, the services of through billing and delivery directly to the ocean lines, and they need, as well, storage at the point of connection between the railroads and the ocean vessels. These services they must have from the railroads or from some one else. The appellants, by reason of their location at a point from which they can deal directly with the ocean carriers, have no need to ask these services from the railroads or from any one else. That constitutes the advantage their location gives them. For such services, therefore, they were quite properly not required to pay under the tariffs that the commission displaced.

The appellants' ability to get along with the lesser services that they receive from the railroads is thus obviously and naturally related to their ownership of warehouses in proximity to the wharves. It follows that an equalization of rates in disregard of the lesser character of the services they demand deprives them of the element of locational advantage in the value of their properties. That deprivation is not justified by the public interest or by the self-interest of the carriers that serve them. It is a deprivation for the benefit of their competitors alone, and when accomplished by a governmental body is in plain violation of the Fifth Amendment to the Constitution of the United States.

Conclusion.

The court below erred both in its refusal to enjoin the commission's order for an equalization of rates and in its refusal to enjoin that prohibiting allowances to the appellants for substituted transportation from their warehouses to adjoining piers. The decision below should therefore be reversed and the case remanded to the court below with instructions to grant the relief prayed.

Respectfully submitted,

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